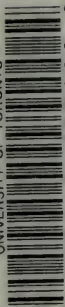
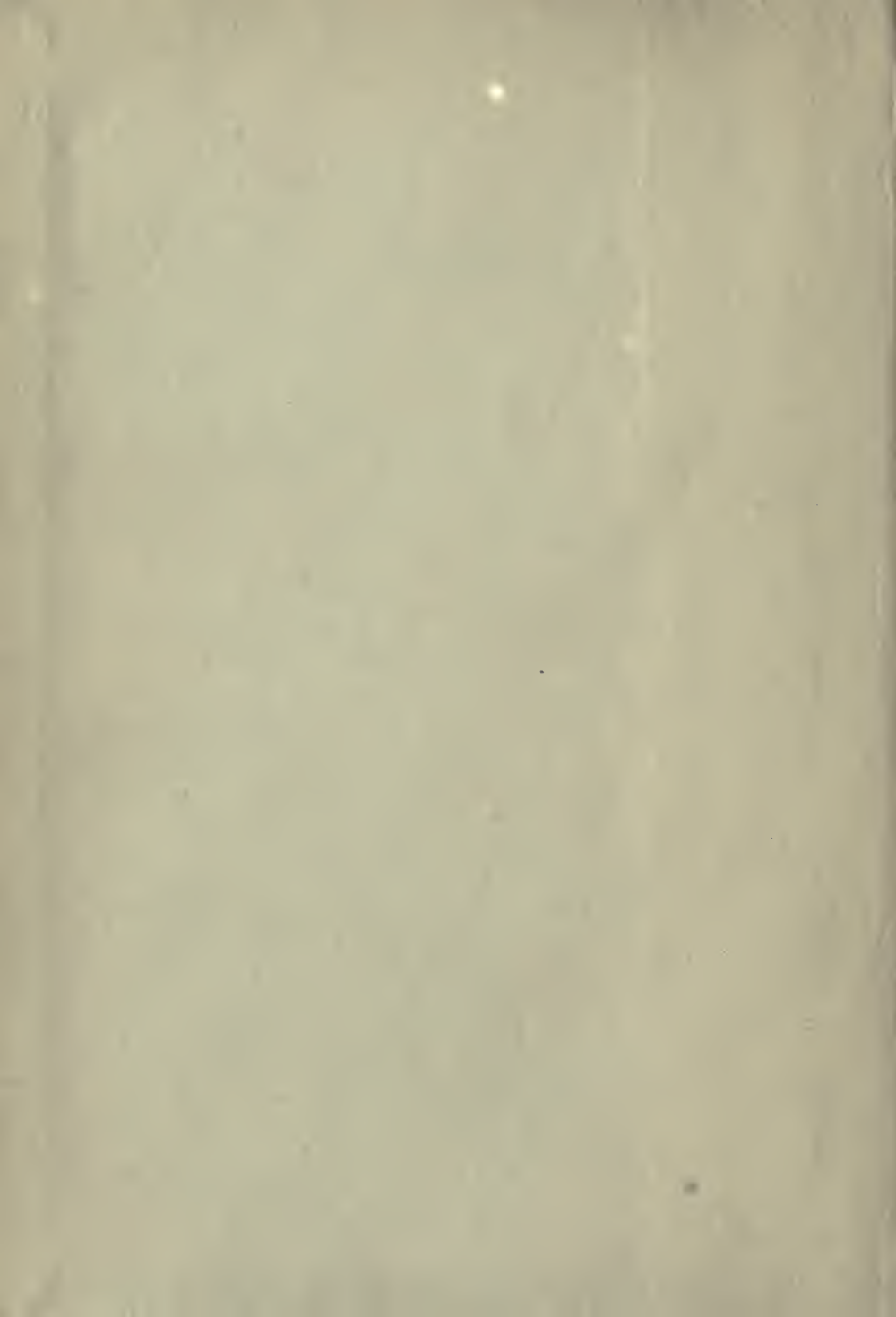


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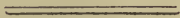
OF

THE CANADIAN CONSTITUTION

— BY —

W. H. P. CLEMENT, B. A., LL. B. (TOR.)

OF OSGOODE HALL, BARRISTER-AT-LAW.



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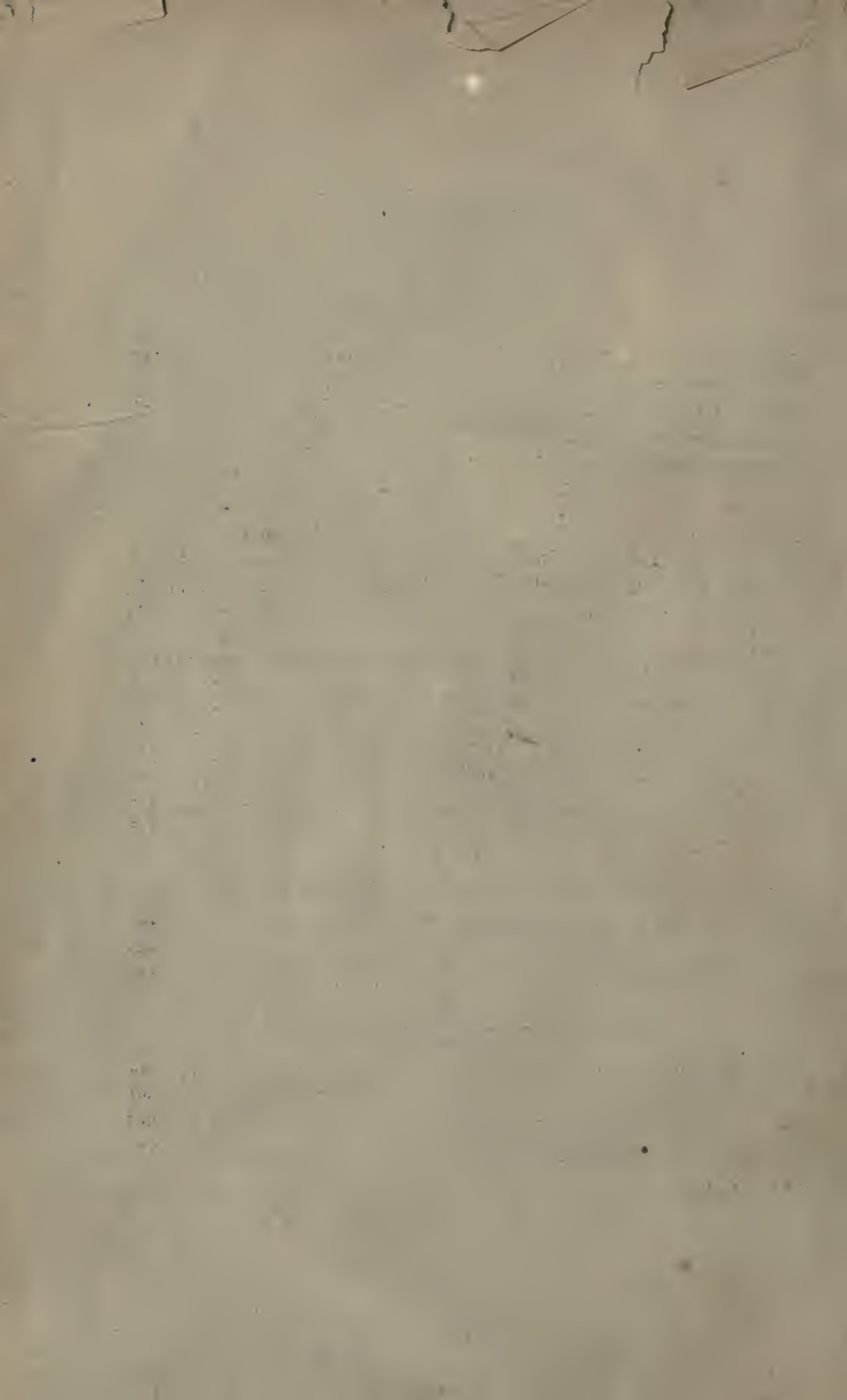
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## PREFACE.

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In this work, I have endeavored to exhibit, in as compact a form as the wide scope of the subject permits, the Law of the Canadian Constitution in reference as well to our position as a Colony of the Empire, as to our self-government under the federal scheme of the B. N. A. Act.

No work upon the first branch of the subject is in existence. The works of Clark and Merivale upon the Colonies are very antiquated, and since their publication the colonial system of the British Empire has to a very great extent been recast. In collecting the authorities, therefore, upon this branch of English jurisprudence into one book, I shall, at least, have done something to lighten the labor of those who have occasion to deal with questions relating to our connection with the Mother Country.

Upon the second branch—our internal self-government under the B. N. A. Act—the need of such a book as this has been felt for some time. Mr. Doutre's work was prepared at a time when judicial leaning was very largely toward minimizing the sphere of provincial autonomy, and the decisions since that date have not only been numerous, but those of the Judicial Committee of the Privy Council, particularly, have given a very different aspect to the law governing the relations of the provinces to the federal government.

I have also endeavored to exhibit clearly the position of the provinces and territories acquired since 1867, and have referred as freely to the decisions of the Courts in those more recent additions to the Dominion as to the authorities in the older provinces.

A glance at the Table of Contents will suffice to disclose the general mode of treatment I have adopted, and further remarks here would serve no good purpose. While, fully sensible of many defects in the execution of this work, I have strong hopes that it may prove useful, not merely to the profession, but to all those who desire information in reference to our rather unique form of government.

W. H. P. CLEMENT.

TORONTO,

26th Sept., 1892.

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## ERRATA ET CORRIGENDA.

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- Page 40, line 19—for “*clearly*” read “*equally*.”
- “ 126, “ 12—“ “*we have enumerated*” read “*enunciated*.”
- “ 187, “ 32—“ “*on*” read “*no*.”
- “ 194, What is said in the note (c) is subsequently qualified; see pp. 348-9.
- “ 228, The sentence beginning on line 4, is subsequently qualified.
- “ 289, line 18—for “1875” read “1874.”
- “ 297, “ 5—“ “*distribution*” read “*re-distribution*.”
- “ — “ 19—“ “1892” read “1891.”
- “ 406, Reference should be made to the decisions in British Columbia; see p. —
- “ 429, head-line—for “*sec. 91*” read “*sec. 92*.”
- “ 444, line 18—for “*majorities*” read “*majority*.”
- “ 469, “ 18—“ “*35 Vic.*” read “*53 Vic.*”
- “ 479, line 4—for “*milked*” read “*milk*.”
- “ 538, note (f)—supply reference to p. 470.

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PART I.  
INTRODUCTORY.

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# THE Law of the Canadian Constitution.

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## CHAPTER I.

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### OUR POLITICAL SYSTEM—A COMPARATIVE EXAMINATION.

By virtue of a certain Act (*a*), passed by the Parliament of the United Kingdom, and Her Majesty's proclamation pursuant thereto (*b*), the Dominion of Canada became "a new thing under the sun" of the first day of July, 1867. The Imperial Act provides for its own citation as "The British North America Act, 1867," but we shall not only save space, but conform also to usage on this side of the Atlantic, by using throughout the shorter title of "The B. N. A. Act" (*c*). For a quarter of a century our form of political organization has been, under that Act, a "general" government (of which we shall always speak as the "Dominion" government), charged with matters of common interest to the whole country, and "local" governments (to be spoken of as "Provincial" governments), charged with the control of local matters in their respective sections.

(*a*) 30 & 31 Vic. c. 3 (Imp).      (*b*) Sec. 3.

(*c*) Subsequent amendments are similarly entitled, but whenever it becomes necessary to refer to any one of them, we shall, by way of distinction, add the year.



The sphere of political activity, assigned to each of these two sorts of government, is carefully mapped out in the B. N. A. Act; taken together, they comprise the most extensive field of colonial self-government in the British Empire to-day. The constitution, too, of each of those governments is provided for, either expressly, as in the case of the Dominion government, or by the incorporation into the Act of previously existing constitutions, as in the case of some, at least, of the Provincial governments.

In the preamble to the B. N. A. Act, it is recited that the provinces of Canada, Nova Scotia and New Brunswick, had expressed their desire for a federal union into one Dominion, "*with a constitution similar in principle to that of the United Kingdom*," and the opinion is ventured that such a union would conduce to the welfare of the provinces, and promote the interests of the British Empire. "Be it *therefore* enacted," etc.

A clearer indication that the design of the B. N. A. Act was to establish in Canada such a union with such a constitution as was desired by the petitioning provinces, could hardly have been given. The expression of desire to which the Act refers in the recital above quoted, is to be found in the third and fourth of the resolutions passed at the Conference, at Quebec, of delegates from the various provinces :

"III. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and the promotion of the best interests of the people of these provinces, desire to follow the model of the British Constitution so far as our circumstances will permit.

"IV. The Executive authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the representative of the Sovereign, duly authorized."

It should, perhaps, be noticed that these resolutions make reference to the constitution of the "general" government only, and the preamble to the B. N. A. Act is capable of a similarly limited interpretation. The observation applies, too, to the additional recital in the preamble, that "it is expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the executive government therein be declared." A perusal of the next chapter, however, and of what is there said in reference to the survival of the pre-Confederation provinces,—the continuity (so to speak) of their legislatures and their executive authority,—will, as we proceed, suffice to show that our present argument applies *a fortiori* to the Provincial Constitutions.

Reverting then to the preamble to the B. N. A. Act, one would naturally expect that the design so clearly announced, would be effectually carried out in the enacting clauses of the Act. There have not been wanting, however, those who have contended that the performance has fallen far short of the promise; that the B. N. A. Act is in its preamble a notable instance of "official mendacity" (d); and that the effect of its enactment has been, the establishment in Canada of a system of government presenting features analogous rather to those of the government of the United States than to those of the British constitution. This view of the Canadian constitution is quite erroneous, founded upon a very superficial observation of the structure of government in this Dominion, and wanting in a proper regard for the underlying principle, in conformity to which

(d) Dicey (Prof. A. V.)—"The Law of the Constitution," 3rd ed., p. 155. As the Professor himself would say, "it is worth noting" that the criticism of this preamble, in which he indulges, is inaccurate. The provinces *had* expressed their desire for a constitution "similar in principle," etc., as a perusal of the Resolutions, above quoted, will show, and the preamble therefore is literally true. We waive, however, this verbal criticism of the Professor's statement, and treat it as indicative merely of his view of the effect of the B. N. A. Act.

the pre-Confederation provinces had been governed, and the Dominion and its federated provinces have since been governed,—the principle, as we shall endeavor to show, which is the chief distinguishing feature of the British form of government, the Empire over, as contrasted with the constitution of the United States. Because the union of the B. N. A. provinces is federal, indicating, *ex necessitate*, some sort of a division of the field of governmental action, an allotment of some part of that field to a “central” government, the conclusion is rashly arrived at, that these matters of outward and superficial resemblance between our system of government and that of the neighboring Republic, are sufficient to stamp them as essentially alike. A closer examination of the B. N. A. Act itself, coupled with some slight knowledge of the pre-existing provincial constitutions, and their practical working, would have sufficed to show that, in essentials, we have a constitution not like the constitution of the United States, but “similar in principle to that of the United Kingdom.” In this instance, at least, the Imperial parliament has not laid itself open to the reproach addressed in Holy Writ to certain unnatural parents. We in Canada labor under the impression that we have got what we asked for; whether it is, or is not, good for us, is not, perhaps, matter for discussion in a work of this kind.

To arrive at an intelligent conclusion upon this much discussed question—to which form of government, the British or the American, does our government in principle conform?—one must necessarily first formulate in his own mind some definite notion of the difference in principle between these two systems, with which in turn we desire to compare or contrast ours. It may, perhaps, turn out that a candid comparison will disclose that the difference between them should hardly be characterized as a difference *in principle*,—that in each the same motive power is applied to the same end, with only some difference in the mode of application.

The British Empire and the American Union consist, each of a central or "national" government, with subordinate "local" governments. The central government in each is the only organization entitled to international recognition as the embodiment of the national will; but it is, at the same time, the comprehensive organism which overlies and binds together the various "local" governments existing within the borders of the Empire or Union. In the case of the United States, the central or Federal government has always received treatment as a tangible "national" government over one compact territory; but the British Constitution has, as a rule, been looked at as the constitution rather of Great Britain, than as an Imperial constitution. The reason is partly geographical, partly historical. The Imperial constitution, as it to-day exists, is the result of the gradual application to the government of an expanding empire, of those principles of local self-government which were adopted, at the start, as the basis of the federal union of the American colonies but this *Imperial* phase of the British constitution has been rather overlooked. If we can, in imagination, place ourselves in the world of (say) 1776, and try to appreciate just to what stage the British constitution had arrived, it will be found that the struggle in Great Britain to that date, had been a struggle between "the individual" and "the State." That question had been finally settled, and the individual was protected by, and subject only to, the law of the land, and the despotism of discretionary government was forever abolished. Next in order came the question of "local" self-government (*e*). In compact Eng-

(*e*) The federal idea is really nothing more than the logical outcome of the "individualistic" idea, which lies at the bottom of self-government; and it would be an interesting task to trace the growth of the idea from its root in the belief that man has certain "natural rights," and that society controls his exercise of those rights, only to the extent necessary to give proper play to the like rights of his fellow-men, up through the growth of municipal self-government to the establishment of a federal system of government, logical from root to topmost branch.



land, the question had not become one of practical politics (the Irish question was not then on the carpet), but as to the government of the colonies, it loomed up larger and larger as the colonies increased in population; and the loss of the Southern half of this continent is standing proof of the failure of English statesmen of those days, to grapple with the problem. The thirteen colonies, mutually independent, having joined to destroy the common tie of subjection to Great Britain, but desiring still to perpetuate their union of race and common interest, had to face the task of forming a central or union government, in such fashion as to reconcile national unity with those ideas of the right of local self-government which had been the cause of their separation from the Empire. Schooled by the failure of the "Articles of Confederation" to work this result, they formulated the "Constitution of the United States," under which they have lived and thrived for over one hundred years (*f*). That which, by revolution and a formal written convention, they accomplished, is now working its way out in the colonial system of the British Empire. To-day, the right of local self-government in the British colonies depends on the "conventions, usages and understandings," recognized and acted upon by the statesmen who, throughout the Empire, are at the head of public affairs. The maintenance of national unity is legally with the government of the United Kingdom, but there are not wanting signs of a desire for a system of true Federal government, in which, as to matters of Imperial concern, the whole shall govern the parts, and not one of the parts the whole.

Viewed then as an Imperial system, the British constitution does not differ in principle from the constitution of the

(*f*) "I think and believe that it is one of the most skilful works which human intelligence ever created; is one of the most perfect organizations that ever governed a free people. To say that it has some defects is but to say that it is not the work of Omniscience, but of human intellects."—*Sir John A. Macdonald*, Confed. Deb. p. 32.



United States. In the one, by the written *law* of the constitution, in the other by the unwritten "*conventions*" of the constitution, the field of governmental action is divided, and in each there exists a "national" government, charged with matters of common concern to the whole nation, and "local" governments, charged with matters of local concern to the inhabitants of each of the territorial divisions of which that nation is composed. The fact that the "national" government of the British Empire, is also the "local" government of one of the territorial divisions of the Empire, is an anomaly which will no doubt disappear, but which makes no difference in principle. Although the parliament of the United Kingdom is the supreme power in government under the British constitution, there is a clear and even legal distinction between the exercise of its authority as an Imperial parliament, and the exercise of its authority as the parliament of the United Kingdom. *Prima facie*, it acts as the latter, and there must be "express words or necessary intendment" in order to make its acts truly imperial—it must, in other words, act deliberately and with intent, when it would convert itself (so to speak) into the legislative organ of the Empire (*g*). So that if it be said that the parliament of the United Kingdom is supreme throughout the Empire, it can with equal truth be said, that in affairs truly Imperial, that parliament speaks the will, or what it deems to be the will, of the whole body of the people of the Empire.

The British Empire is scattered over the whole earth, and in the practical work of government, matters of common concern are few and far between—much more so in fact than is commonly imagined. Take, for example, all that class of matters dealt with by the British government under the head of Foreign Affairs. The vast majority of these matters cannot be said, in any practical sense, to be Imperial—of *common* concern to the Empire—relating largely, as

(*g*) See *post*, Chap. IV.; 28 & 29 Vic. c. 63 (Imp.); also Chap. IX., *post*.

they do, to the intercourse between Great Britain and her European neighbors (*h*); and, as to these, the British Government can hardly be said to act as an Imperial government. Their recognition as matters largely of "local" concern to Great Britain, is made apparent in the case, for instance, of many British treaties, by the reservation to the colonies, in a number of modern instances, of the right to share, or to decline to share, the benefit and burden of these treaties just as each colony may see fit to determine for itself. Modern constitutional usage in the British Empire is rapidly approaching the point where, in matters concerning the colonies in their general relations between themselves (*i*), or the relations of the colonies generally with foreign powers, the will of the colonies concerned is given effect to, unless the will of the Empire as a whole should differ therefrom, and where in matters concerning the relations of the colonies to the Mother Country, those relations are settled by agreement as between independent negotiators.

In truth, the constitution of the Empire is as truly federal as is the constitution of the United States. Owing to the historical accident that the Empire is but the expansion of the population of the United Kingdom, the "local" government of the original parent stem has hitherto continued to be, as we have said, the "national" government of the Empire, but by gradual modification, by conventions and usages, the functions of the British Parliament, so far as it controls the "national" government of the Empire, are performed according to the will of the Empire. The true federal idea is clearly manifest—to reconcile national unity

(*h*) The very fact that different parts of the Empire lie contiguous to different foreign powers will, perhaps, necessitate the enlargement of the sphere of local self-government in the units of the British Confederation that is to be; or, from the other view, the matters of common concern will necessarily be fewer, and the sphere of the "central" government narrower than is the case in a compact territory like that of the United States.

(*i*) The B. N. A. Act deals with such matters.

with the right of local self-government—the very same idea that is stamped on the written constitution agreed upon by the people of the United States. The difference of position historically is quite sufficient to account for the difference of position legally. Given the independent self-governing communities, which made up the American Commonwealth, the “national” government was super-imposed to secure unity, but upon conditions preservative of local autonomy. With us, on the other hand, the central government stands historically first, but the various communities which grew out of it have, by gradual concession, secured at least as full a measure of the right of local self-government as is enjoyed by the individual States, which together form the neighboring Republic. The sum total of conceded power at any given period, will be found to be commensurate with the opinion prevalent at such period as to the proper line of division between Imperial and local concerns.

It may, perhaps, be contended that the “national” government of the British Empire, having the power to lay down the line, which is to be the legal line of division between matters of common and matters of local concern, at just such a point as to it seems proper, differs in this respect from the “national” government of the United States. The common description of the Federal government of the United States, as a government possessed of specially delegated powers only, would seem to support this distinction. But, in truth, this special delegation is, for all practical purposes, of government, a delegation of power sufficiently wide to enable the Federal government to be itself the regulator of its own sphere of authority. The subject matters are themselves comprehensive in scope, and the “implied power” which Congress possesses to choose such means as it may deem necessary and proper for carrying out the designed end of the “national” government, leaves the decision as to the line of division between Federal and State matters very much in Congress’ hands;

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and thoughtful American writers are not slow in asserting that Congress is as fully the supreme power in the American political system as is the British Parliament in our Imperial system (*j*). But however this may be, and even if we must go back to "We, the people of the United States" as the supreme power in the American system, we shall find, as might be expected, that the people, as a whole, are legally the rulers of the people in parts, and that the line of division which shall, at any moment, separate the fields of Federal and State action, depends not on the will of the individual States, but on the will of "the people of the United States"—the authors of the "Constitution" as it exists to-day—who can alter it at any time and make it conform to their will. Cumbersome we may think the machinery provided for effecting any desired amendment; but it is there; and no one can say that the next amendment will not be a simplification of the machinery for amendment.

Having shown the presence of the Federal principle in the British constitution, it must be admitted that the constitution of the United States, century-old as it is, carries that principle into action much more logically than does the British constitution of to-day. Were it not for the fact to which we have alluded, namely, that the matters of common concern, requiring governmental action, are few, the British Empire would not long hang together in its present hap-hazard form of federal government. The want of legal limit to the power of the "national" government, does not make itself seriously felt, owing to this scarcity of matters of common concern, and to this further fact, that the statesmen at the head of the British government have, in the main, carefully observed the "conven-

(*j*) Prof. Woodrow Wilson, in "Congressional Government" 4th ed.: "For all practical purposes, the National Government is supreme over the State Governments, and Congress predominant over its so-called co-ordinate branches": p. 52. See, however, a criticism of this work by Mr. A. Lawrence Lowell in his "Essays on Government," p. 46 *et seq.*



tional" limits, and have, in those few matters of common concern, endeavored to carry on the Imperial government in accordance with the wishes of the Empire as a whole, so far as, under our illogical system, those wishes are capable of being ascertained. \*

We have spoken of the want of legal limit to the power of the "national" government under the British Imperial system. The expression is perhaps hardly accurate—the want which really exists is the want of legal limit to the legislative power of the British parliament. The result is that the legal line of division between the fields of Imperial and colonial government, is a most uncertain one, although becoming less so. But although one must ransack both British and colonial statutes to ascertain this line, it is, when ascertained, and at any given moment of time, a legal line of division, and governmental action will be kept by the courts within its proper sphere. No judge within the Empire can legally limit the British Parliament as a legislative body, or treat its enactments as *ultra vires*; but the very same thing may be said of that "amended Act" of the supreme legislative authority of the United States—its present "Constitution"—or of any future amendment thereof. But under both the British and the United States systems—systems of government-according-to-law—the courts charged with the enforcement of *law* must decline to recognize the validity, the lawfulness, of any governmental act, done by any person or body of persons, beyond the limits to which they are legally subject.

The enforcement by the courts, colonial and British, of the legal limitations upon colonial legislative power, is matter of legal notoriety (*k*), apart altogether from the cases which have arisen relative to the division of the field of Canadian government between the Dominion and Provincial legislatures; and no less notorious is, or should be, the enforcement by the courts, of the legal limits set to

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(*k* See post, Chap. IX.



governmental interference (other than by Imperial law-making) on the part of the "national" authorities with colonial rights of self-government (*l*). The "sphere of authority" of the British parliament, *as a law-making body* for the Empire, is legally unlimited, and within that unlimited sphere it may exercise its law-making powers in whatever fashion may appear proper to it. The "sphere of authority" of Congress as a law-making body is not unlimited, but over matters within that sphere (be it wide or narrow), the power of legislation is plenary, and subject to no limitations capable of judicial enforcement.

We have not ~~therefore~~ <sup>discovered</sup> yet the difference in principle between the British and the American systems of government. It is not in respect of the federal idea—that is common to both; nor in respect of the rule of law, the enforcement by the courts of the law of the constitution—that, too, is common ground. We are driven, therefore, to examine the *machinery* of government; and here we shall find a difference which runs through the "national" and "local" governments alike of these two systems. The difference in principle is not in those parts of the body politic which exercise legislative functions, nor in those which are executive, but in the connection between the two—the connection between the law-making and the law-executing departments of government.

It must appear clear, upon consideration, that in any country under the rule of law, the body to which by the constitution is entrusted the power to make law, must necessarily be the supreme power in government. The body to which the executive functions of government are entrusted must obey the law, and the extent of its power to exercise its own volition entirely depends on the legislative body. That body may content itself with enacting general laws, laying down broad principles, or giving general directions in reference to government, and in such case

(*l*) Campbell v. Hall, Cowp. 209.

the choice of means, manner, and time, left with the executive, constitutes that executive a power capable of exhibiting the imprint of its own *discretion* in the actual carrying on of public affairs. On the other hand, the legislature may go to such length of legislative detail, may so specifically provide the means, manner, and time, for the performance of any work of government, that the executive may sink to the level of a purely routine office, and the power of any member of the executive staff to exercise discretion, as to how or when he shall perform his duties, be entirely taken away. The history of constitutional progress in England is the history of the steps by which the Legislature compelled the Executive to recognise the supremacy of law—in other words, the supremacy of the Legislature; and so long as the Executive withheld this full recognition, legislation continued to be more and more specific in its provisions, more of a curb and fetter upon executive discretion. But now that the principle of executive responsibility is recognized to the full, the tendency of legislation is, in many matters, rather the other way; and many details of governmental action are left to be provided for by order in council or departmental regulation, or even left to the discretion of the official who has charge of the particular work.

It must be observed, too, that this supremacy of the legislative department of government is just as clearly apparent under a federal system where the government is a government-according-to-law, as under what has been called a “unitarian” system, under the like rule of law. The federal idea has no more necessary relation to the separation of the spheres of authority of the legislative and executive departments than has the “unitarian” idea. The English constitution (viewed as the constitution of the United Kingdom merely) and the French constitution are manifestations of the “unitarian” idea in government; but, in the former, the supremacy of the legislature over the executive is a dominant principle; while, in the latter, the

executive is, in many respects, recognized as above the law, as having a law peculiar to, and moulded by itself—the *droit administratif*—and somewhat the same distinction may be drawn between the two representative federal constitutions, that of the United States and that of the Swiss Republic.

Reasoning, *a priori*, therefore, one would say, that, in both the British and the American systems, the body which makes the law must necessarily be supreme over the body which simply carries out the law when made; and it is not surprising, therefore, to find that in the British system, not only is this supremacy recognized, but, by a certain arrangement of the machinery of government, the will of the law-making body is made to sympathetically affect and control the will of the executive in the administration of public affairs; and the administrative knowledge of the executive is utilized to the full in the work of legislation. The same supremacy necessarily exists in the United States system; that is, the executive department of the Federal government, or of any one of the State governments, must administer public affairs according to law. But, in their system, there seems apparent a determined effort to prevent co-operation and sympathy.

What then is this arrangement of machinery to which we have referred as existing in the British system?

Of late years it has been found necessary to revise somewhat our ideas concerning the British constitution. The older authorities dwell upon the division of power between the legislative and executive departments of government, and the subdivision, in turn, of the legislative department into King, Lords, and Commons; and they (*m*) dilate with quiet enthusiasm upon the “checks and balances” provided in and by such a division and subdivision of power. Gradually, however, this “literary theory,” safe-guarding the ark of the constitution with its supposed division of

(*m*) *e. g.* Chitty On the Prerogatives of the Crown, at p. 2.

sovereignty into departments, each, as it were, checking whatever of evil there might be in the uncontrolled action of the others, and yet each supposed to be in a sense independent of the others—gradually, we say, this theory came to be seen to be an incomplete, and, in truth, wholly erroneous explanation of the working of the constitution. The rising spirit of democracy had silently permeated the system of government, without any apparent disintegration of parts, but with a difference in the practical “residence” of power, which at length challenged recognition at the hands of those who would expound the constitution and its law.

Of comparatively recent writers, the late Walter Bagehot, in his most valuable essays, attacks with vigor this “literary theory,” with its supposed checks and balances, and as a result of an interesting study of constitutional dynamics, arrives at this conclusion :

“The efficient secret of the English constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is the Cabinet. By that new word we mean a committee of the legislative body selected to be the executive body. The legislature has many committees, but this is its greatest. It chooses for this, its main committee, the men in whom it has most confidence. It does not, it is true, choose them directly ; but it is nearly omnipotent in choosing them indirectly. . . . The Cabinet, in a word, is a Board of Control, chosen by the legislature, out of persons whom it trusts and knows, to rule the Nation. . . . A cabinet is a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State. In its origin, it belongs to the one, in its functions, it belongs to the other.”

and he proceeds further to show how, by this practical fusion, this result is clearly attained—that the will of the



people constitutionally expressed through their elected representatives in the House of Commons, controls both the law-making and the law-executing power, and is, in very fact, the ultimate power in government.

✓ Mr. Dicey, in a work to which reference has already been made, treats of 'the *law* of the constitution,' and insists on this as the legal principle discernible throughout, namely, *the supremacy of Parliament*. Viewed as a legal question, the solution of the problem stops short at the expression (in Act of Parliament) of the will of Parliament, and from that standpoint we may summarize the result thus: The Imperial Parliament is supreme over the Executive. By the legal expression of its will in statutory form, it controls the exercise of executive authority; may add to, or take from, the power of that department of government, or may subject the exercise of executive power to such conditions of time, place, or manner of action, as to Parliament may seem proper. The law of the constitution does, however, take this cognizance of the "power behind the throne," that the method of electing the House of Commons is provided for by Act of Parliament.

Viewed in the light of the "conventions of the constitution," the responsibility of the executive to the legislature for the proper performance of its functions, is guaranteed by those usages and precepts, that code of "conventions" which provide that, upon losing the confidence of the House of Commons, the Cabinet must resign, and give place to an executive which will command that confidence (*n*).

This responsibility of the executive to the people, through the House of Commons—the elective branch of parliament—is the principle of the British constitution,

(*n*) The last chapter in Prof. Dicey's book is a very interesting effort to show that the "conventions" of the British constitution rest upon a basis of *legal* sanction—that the violation of most, if not all, of those conventions, will speedily place the offender in the position of a law-breaker. This idea could hardly be worked out in the matter of the "conventions" as to colonial self-government.



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and is worked out in government somewhat upon the principle of the endless chain. Travelling in one direction along the links of this chain, we find an executive committee, practically appointed by, and subject to deposition at the hands of the Commons, executing upon and over the governed those laws of the land which are made, or allowed to remain such, by that branch of parliament which is elected by the people through certain executive machinery appointed by parliament, and put in motion by the executive committee. A reversal of the process leads to the same result—the discovery that the motive power in government is the will of the people, and that this power works always and only *through parliament*, but that, through the controlling branch of parliament, the governed make their own laws, and provide the means, and regulate the manner, by and in which they are to be governed by those laws.

Turning now to the system of government across the border, we find the same principle of ultimate responsibility to the people; but it is worked out in a very different and much less satisfactory way. We have referred to the “literary theory” of the English constitution. It is not very far from the truth to say that the United States system is an attempt to work out that very theory in actual practice. We may take as our example the “national” government at Washington, for, as we have already said, the type is persistent throughout both the “national” and the “local” governments of the American Union, just as the British type is persistent throughout both the “national” and “local” governments of the British Empire. How it came about that the “literary theory” of the English Constitution was embodied in the Constitution of the United States has been the subject of frequent enquiry, and we venture to quote from a recent American work of great merit:

“The Convention of 1787 was composed of very able men of the English-speaking race. They took the system of government with which they had been familiar, improved it, adapted it

to the circumstances with which they had to deal, and put it into successful operation. . . . It is needful, however, to remember in this connection, what has already been alluded to, that when that Convention was copying the English constitution, that constitution was in a stage of transition, and had by no means fully developed the features which are now recognized as most characteristic of it. . . . The English constitution of that day had a great many features which did not invite republican imitation. It was suspected, if not known, that the ministers who sat in parliament were little more than the tools of a ministry of Royal favorites, who were kept out of sight behind the strictest confidences of the Court. It was notorious that the subservient parliaments of the day represented the estates and the money of the peers and the influence of the King, rather than the intelligence and purpose of the Nation. . . . It was something more than natural that the convention of 1787 should desire to erect a Congress which would not be subservient, and an executive which could not be despotic; and it was equally to have been expected that they should regard an absolute separation of these two great branches of the system as the only effectual means for the accomplishment of that much desired end" (o).

Prof. Wilson, indeed, shows very clearly, as one would expect, that Congress is now supreme over the executive of the federal government, and "subjects even the details of administration to the constant supervision, and all policy to the watchful intervention of the Standing Committees of Congress"; but he laments the lack of executive responsibility to Congress. The President and the heads of the chief executive departments of government stand apart, isolated from Congress; bound to execute its laws, but with no greater influence in securing the passage of laws in aid of effective administration, or in preventing the passage of laws which may hamper administration, than is possessed by any other private citizen. By the terms of the "Constitution" itself, they are debarred from seats in

Congress (*p*), and so have no initiative in legislation. On the other hand, Congress must go to the full extent of law-making in order to exercise its supremacy over the executive; but the trouble may be, not in the law, but in the execution of that law, and no matter to what extent of detail the law may make provision, one may expect that an executive, perhaps completely out of sympathy with the law, will not be a very satisfactory administrator of that law. In short, there is no guarantee of that harmony between the legislative and executive departments, that sympathy and co-operation, without which there must necessarily arise constant friction, lack of continuity in policy, and even a deadlock in the administration of public affairs. Congress and the executive are responsible, each directly to the people; but the retention of the confidence of Congress is in no way a condition to the retention of office. Congress has no such power to depose the executive as has the House of Commons in the English constitutional system. Moreover, the constant possibility of party diversity between the Executive and Congress, renders it very difficult to fasten responsibility upon either. This difficulty is thus strongly put by Prof. Wilson, in the work from which we have already quoted:

“Is Congress rated for corrupt, or imperfect, or foolish legislation? . . . Does administration blunder and run itself into all sorts of straits? The Secretaries hasten to plead the unreasonable or unwise commands of Congress, and Congress falls to blaming the Secretaries. The Secretaries aver that the whole mischief might have been avoided, if they had only been allowed to suggest the proper measures; and the men who framed the existing measures, in their turn, avow their despair of good government, so long as they must entrust all their plans to the bungling incompetence of men who are appointed by, and responsible to somebody else. How is the school-master, the nation, to know which boy needs the whipping?” (*q*).

(*p*) Art. I., sec. 6.

(*q*) Congressional Government, p. 283.

In the preface to the same work, the distinction between the British and the American systems of government is shortly stated, in language which we have no hesitation in adopting.

“It is our legislative and administrative machinery which makes our government essentially different from all other great governmental systems. The most striking contrast in modern politics is not between Presidential and Monarchical governments, but between Congressional and Parliamentary governments. Congressional government is *Committee* government; Parliamentary government is government by a responsible *Cabinet ministry*.”

“These are the two principal types which present themselves for the instruction of the modern student of the practical in politics: administration by semi-independent executive agents, who obey the dictation of a legislature to which they are not responsible; and administration by executive agents, who are the accredited leaders and accountable servants of a legislature virtually supreme in all things.”

Neither need we hesitate to give expression to our decided preference for the system of cabinet government which obtains in England, when we find so thoughtful a writer as Prof. Wilson—a citizen of the Republic at that—doing the like.

After this comparison of the two leading types of Anglo-Saxon self-government, it is easy to decide to which the Canadian constitution conforms.

We shall have occasion to again refer to the limits set to our right of self-government, by reason of our colonial subjection to the ultimate supremacy of the Imperial parliament. In this chapter, we have endeavored to show that this subjection is but that subordination of a “local” to a “national” government, essential in any truly federal scheme of government. If, indeed, to establish our position, we must show that some one parliamentary body, elected by a Canadian electorate, is possessed of the ultimate sovereignty in Canada over every conceivable subject



matter of governmental action, the discussion need go no further; for, admittedly, we are a colony of Great Britain, and in the ultimate legal analysis our government is from without. This, however, is not, we take it, the point of distinction.

If we can show that so far as the right of local self-government—the right to make the laws by which we are to be governed, and to execute those laws as suits ourselves—has been conceded, our power is exercisable, the law-making power with the same efficacy, and the law-executing power, under the same principle of responsibility to parliament, and, through parliament, to the electorate, as in the United Kingdom, we shall have established our proposition.

To any one who has knowledge of the constitutions of the provinces prior to confederation, it is unnecessary to point out, that since the concession of "Responsible Government," and up to 1867, those constitutions were "similar in principle to that of the United Kingdom," and that all that has been said in reference to the British constitution might be repeated in reference to (old) Canada, Nova Scotia, and New Brunswick.

Nor will it be contended that, under the B. N. A. Act, the sum total of our rights of self-government has been lessened; in fact, as we shall have occasion to show, that sum total has been largely increased, both legally and by "conventions." And no one who knows the actual working of the machinery of government in Canada, will contend that we have, either in the Dominion government, or the government of the various provinces, other than a parliamentary government.

It has been usual to speak of "the division of power" under a federal system. In truth, this form of expression is most inapt, and very inaccurately describes the division of labor which really exists. Its thoughtless use has been fruitful of much misconception of the true line or principle



of division. Bearing in mind what is involved in the term government—law-making and law-executing—and the co-extensive and complementary spheres of action of these two chief departments of government, we shall find that there is, in our system, no “division of *power*” in the sense in which such division was, by the older writers, erroneously assumed to exist under the British form of government; and certainly none in the sense in which such division does actually exist in the individual systems of the United States. Our simile of the endless chain may, perhaps, serve to impress the true principle of our form of government upon the reader, and that principle underlies the practical working of each and every of our governmental organizations, Dominion and Provincial.

The true line of division is this: The various subject matters, with which government can be supposed to have anything to do, are divided into two great divisions (*r*)—matters of general and matters of local concern—but to each of such divisions, the full equipment of power, legislative and executive, is given. There is no division of function in the sense that as to any given subject matter, legislative power resides in one organization or government, and executive power in another; as to any given subject matter, the full power of government rests in one and the same governmental body. The Dominion government and the Provincial governments are (each within the sphere of its legitimate operation) carried on, on the same principle as the government of the United Kingdom. Jurisdiction as to subject matter conceded, the will of the legislature, Dominion or Provincial, is supreme over the executive, in the same sense as the will of the Imperial parliament is supreme over the executive in the United Kingdom. The legal principle, so strongly insisted upon by Mr. Dicey—the supremacy of parliament—as clearly appears here as in the United Kingdom; while, for the “conventional” aspect of the

(*r*) See *Bank of Toronto v. Lambe*, 12 App. Cas. 587, and *post*, Chap. X.

question, it is only necessary to carry the comparison one step further, and point out that, as in the United Kingdom, so here, the ultimate responsibility of the executive to the electorate, through the elective branch of the legislature, is clearly established, in relation as well to each provincial as to the Dominion government. The elective branch of the legislature (Dominion Parliament or Provincial Legislative Assembly) represents, and is directly responsible to, the electorate—as in the United Kingdom. The Executive Committee (the cabinet) composed of members of the legislature, holding their positions by virtue of, and contingently upon, the retention of the confidence of the elective branch of that Legislature, are therefore, practically directly responsible to that elective branch—as in the United Kingdom. The same chain of connected relation, the same source of motive power, and the same method of applying that power to the work of government, exists in each of our governmental bodies, as in the United Kingdom.

In this view of the Canadian constitution, the extent to which the executive department of the Dominion government may exercise, over Acts of the provincial legislative assembly, the power of disallowance, will appear quite immaterial when it is borne in mind that this power is, in any given case, exercised under the same responsibility (directly to the Dominion parliament, and indirectly, through the elective branch of that parliament, to the electorate) as exists in relation to the exercise of any other executive power lodged in the hands of the Dominion government. And so as to any other points of contact, or even conflict, between the Dominion and Provincial governments—or, for that matter, between two local governments—for its conduct with regard to such matter of contact or conflict, for its action or inaction, each government (executive and legislative department alike) is responsible ultimately to the electorate, who condemn or approve in the very same way and with like results as in the case, for

example, of a conflict between Lords and Commons in the United Kingdom.

Nor would it make the slightest difference, if (as was held in certain quarters, for some years after 1867,) concurrent power over many subject matters were, by the B. N. A. Act, allotted to both the Dominion and Provincial governments, and if the true construction of that Act were, to subordinate provincial legislation upon such matters, to Dominion legislation thereon. Colonial legislation is completely subordinate to Imperial, and to the extent of its "repugnancy" to such Imperial legislation, is utterly void; and yet no one, we fancy, would contend that, by reason of such subordination, the constitutions of the pre-Confederation provinces, for example, were other than constitutions similar in principle to that of the United Kingdom. The sphere of their power of government was limited by reason of their colonial status, but so far as they had power, that power was exercised through the same medium of responsible parliamentary government. And so now, under the B. N. A. Act, each government, Dominion or Provincial, has limitations set to its sphere of operation, but each, within its sphere, is a responsible parliamentary government.

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## CHAPTER II.

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### THE PRE-CONFEDERATION CONSTITUTIONS.

To (properly appreciate) the merits or accurately note the defects of any form of government, it must be studied in its actual present working—examined, so to speak, in motion—and if the B. N. A. Act were the creation of a governmental organism, new in all its parts, we might lack justification for indulging in historical retrospect back of 1867. But, just because the slate was not cleaned, just because many parts of the machinery of government existing in the provinces prior to Confederation were continued in the new plant set up in the various provinces, it will be necessary to examine the earlier constitutions of those provinces. Indeed, it will appear that in at least two of them, New Brunswick and Nova Scotia (*a*), the governmental machinery was left by the B. N. A. Act almost intact, and new plant was provided only for the Dominion government and the provinces of Ontario and Quebec (*b*). These reasons, here urged in brief, will develop themselves more at length as we progress in our examination of the scheme of government contained in the B. N. A. Act. To avoid undue repetition, the proof must be somewhat delayed. In any case, a short historical retrospect would probably not be considered out of order.

(*a*) The same remark applies to British Columbia and Prince Edward Island upon their admission to the Dominion.

(*b*) And afterwards for Manitoba and the North West Territories.



With the view, then, to determine the nature of the constitution of government in the various provinces of which the Dominion is composed, we proceed to discuss briefly, and so far only as is necessary to a proper appreciation of our present system, the constitutional history of those provinces.

To NOVA SCOTIA belongs the distinction of being the oldest of the B. N. A. colonies now forming part of the Dominion. The preamble to one of the earliest Acts (c) of the Nova Scotia Assembly (1759), declares that "this province of Nova Scotia, or Acadie, and the property thereof, did always of right belong to the Crown of England, both by priority of discovery and ancient possession." The correctness of this declaration, France would probably not admit; but the contest would be of antiquarian interest merely, for by the treaty of Utrecht, in 1713, "Nova Scotia, or Acadie, with its ancient boundaries," was ceded by France to the Crown of England in the most ample terms of renunciation. Nova Scotia, as thus ceded, included the present provinces of Nova Scotia (excluding Cape Breton) and New Brunswick, and also part of Maine. For many years after its acquisition, Nova Scotia was practically under the military rule of a governor and council, whose authority was defined in the governor's commission. In 1749, a colonization scheme was set on foot, and anticipating an influx of settlers into the colony, the commission to Governor Cornwallis, of date 1749, authorized the summoning of "general assemblys of the free-holders and planters within your government, according to the usage of the rest of our colonies and plantations in America." After much delay, and the exhibition of much unwillingness on the part of the governor and his council to act upon this direction, a scheme of representation was settled, and the first parliament of Nova Scotia met on the second of October, 1758, at Halifax.

(c) 33 Geo. II. c. 3 (N. S.).



1744  
1758  
1763  
1769  
1773  
1784  
1820  
1867

In 1763, the remaining portions of what are now known as the Maritime Provinces—Cape Breton and Prince Edward Island—were, by the treaty of Paris, ceded to Great Britain; and, by the proclamation which followed, were annexed “to our government of Nova Scotia.”

Six years later, PRINCE EDWARD ISLAND was made a separate province, under a governor of its own, whose commission, also, authorized the calling together of “general assemblys of the free-holders and planters, within your government, in such manner as you in your discretion shall judge most proper,” and according to further instructions. The first parliament of Prince Edward Island met in 1773.

In 1784, NEW BRUNSWICK was made a separate province, with a governor of its own; and his commission, too, authorized, in somewhat similar phraseology, the summoning of a general assembly, which shortly thereafter met.

Of CAPE BRETON’s constitutional vicissitudes it is unnecessary to make mention (*d*). Finally, in 1820, it was re-annexed to the government of Nova Scotia, of which province it has ever since formed, and now forms, part.

So far as the Maritime Provinces (*e*) are concerned, the legislatures of to-day, in those provinces, are the lineal descendants of those early “general assemblys.” But, as we must show, the sphere of their authority in government, in 1867, when Nova Scotia and New Brunswick (*f*) became part of the Dominion of Canada, was very different from their sphere of authority in 1758, and for many years thereafter.

QUEBEC—not the present province of that name, but practically the now provinces of Quebec and Ontario—was

(*d*) They are set out at length in 5 Moo. P. C. 259: *In re* The Island of Cape Breton.

(*e*) The documents relating to the early constitutions of the Maritime Provinces are set out in Return No. 70, Can. Sess. Papers, 1883.

(*f*) And so as to Prince Edward Island in 1873. See *post*.

ceded to Great Britain by the same treaty of Paris, which secured Cape Breton and Prince Edward Island. The proclamation (*g*), to which we have already referred, which followed upon the cession, simply annexed Cape Breton and Prince Edward Island to the government of Nova Scotia, but erected Quebec into a new province, and made provision for its government. Both by that proclamation, and by the commission to Governor Murray, the institution of a representative assembly was contemplated, but, for reasons upon which it is unnecessary to enlarge, no such assembly ever met thereunder; and it was not until after the Imperial parliament intervened (for the second time) in the government of the B. N. A. provinces—after the passage of what is known as “The Constitutional Act, 1791” (*h*), dividing Quebec into the two provinces of Upper and Lower Canada, and providing for a separate legislature in each province—that such assemblies met; that of Upper Canada, at Niagara, on the 17th of September, 1792, and that of Lower Canada, at Quebec, a few months later. In 1840, the two provinces of Upper and Lower Canada were, by what is commonly known as “The Union Act” (*i*), joined together in a legislative union, which lasted until the birth of the Dominion (*j*).

We must now retrace our steps, in order to take a comprehensive view of the nature of the government which was established in the various provinces; and, in taking such a view, it will be, to say the least, convenient to treat of the statutory constitutions of the Upper Provinces separately, and to confine our attention, in the first place, to the constitutions established (in the exercise of the prerogatives of the Crown) by means of the commissions and proclama-

(*g*) See Houston, Constitutional Documents of Canada, p. 67.

(*h*) 31 Geo. III. c. 31 (Imp).

(*i*) 3 & 4 Vic. c. 35 (Imp).

(*j*) We defer consideration of the constitution of British Columbia and of Manitoba and the North West Territories until a later stage. See *post*.

tions, to which we have referred. We may say at once that, along both lines, this survey is undertaken in order to show that, (prior to the date of Confederation, the Imperial government had, in a tangible way—evidenced partly by dispatches, partly by instructions, partly by statutory enactments, partly, perhaps, by long disuse of power along certain lines—put upon record their recognition of (the necessary connection which must exist between the legislative and executive departments) of government, as well in the case of a colony as in the case of the United Kingdom.

As a preliminary to this survey, it is almost indispensable that we should again refer to what was, in the latter part of the eighteenth and the earlier decades of the nineteenth century, the accepted explanation of that scheme of government known as the "British Constitution." In those days, the chief commendation bestowed on that constitution was on account of the complete separation, as was supposed, of the legislative and executive power—legislative supremacy in the parliament, executive supremacy in the Crown. Opportunity for interference by parliament to control and regulate executive action, was largely the result of the financial necessities of the executive head of the nation; but, to the extent to which the revenues of the Crown rendered that executive head independent of parliament, the government of the nation was frequently carried on without that body being summoned together. How the change was gradually brought about, until now the supremacy of parliament over the executive, is a clearly established principle of the British constitution, it is beyond the scope of this work to trace (*k*); but, shortly stated, it would appear to have been effected by the judicious use of the power over the purse strings, in order to secure the consent of the Crown to the relinquishment to parliament of the most important, if not the most numer-

(*k*) See May's Const. Hist., Vol. ii. p. 39.

ically, of those 'common law' powers of the executive known as "the prerogatives of the Crown." But, at the time of which we write, the government of Great Britain was, to an extent very much larger than at present, carried on by the exercise of these prerogatives—that is to say, was largely an executive government—and of no department was this more true than of the colonial, "the Board of Trade and Plantations." The very facts to which we have alluded—that for very many years after the settlement of Nova Scotia (practically until the B. N. A. Act), no legislative interference by the Imperial parliament, in the government of the Maritime Provinces, took place—that provinces were enlarged, divided, joined, all without Act of parliament—and that, without Act of parliament, representative assemblies were established therein—make manifest the extent to which the government of the early provinces was in the nature of executive government, by prerogative. And yet not entirely so, for in the celebrated case of *Campbell v. Hall* (*l*) involving a consideration of the proclamation of 1763 (in its relation to Grenada), it was decided by Lord Mansfield, that, although on the acquisition of new territory by conquest or cession, the Crown, without parliament, may make laws for the government of the conquered or ceded territory (*m*), nevertheless, on the grant to the inhabitants of the right to make laws in and by a representative assembly, the prerogative right of the Crown to make laws in respect of the internal government of the colony is forever gone, and that, thereafter, the Crown stands in the same relation to the representative assembly of the colony as in England to the Imperial parliament; and any withdrawal of the colony's right to make laws can only be effected by the Imperial parliament (*n*).

(*l*) Cowp. 204.

(*m*) This was one of the prerogatives annexed to the Crown as commander-in-chief—a right arising by conquest.

(*n*) See *post*, Chap. VI., *In re* Lord Bishop of Natal, 3 Moo. P. C. (N.S.) 148.



So far, however, as related to the executive functions of government—the administration of public affairs, the execution of the laws of the colonies (whether imposed by imperial or colonial legislative authority); the collection and expenditure of the public revenues, and the appointment and control of the executive officials necessary to these ends—the theoretical independence of the executive, which, as we have shown, obtained in England, was carried to its practical result in the work of government in the colonies. Theoretically and, indeed, legally, the executive head of the nation, by virtue of its position as a constituent branch of parliament, could prevent encroachment by the legislature upon the prerogatives of the Crown—that is, upon the executive department of government—but the financial necessities of the executive in England, gradually led, as we have before observed, to the surrender to parliament, or at least to parliamentary control, of the entire executive government of the nation. The Crown occupied, in the colonies, the same position as a constituent branch of the legislature of a colony, but the financial necessities of the executive government were, in these early days of our colonial history, so largely met by the revenues arising from the sale of the Crown lands, fines, tolls, and other royalties of various sorts, and, for the balance, provided for in the Imperial budget, that the executive of a colony was to a large degree independent of the colonial assembly.

That the early “assemblies” of the provinces were intended to be confined to purely legislative work, and that, in the doing of it, they were not to interfere in the executive government of the colony, is apparent when we come to study somewhat more closely the commissions of the early governors—which were in truth the charters of government in those provinces.

There is no essential difference in the terms of the commissions to Governor Cornwallis (Nova Scotia), Governor Patterson (Prince Edward Island), Governor Carleton (New



Brunswick), and Governor Murray (Quebec); and we therefore take for comment the first commission which conveyed authority to summon an assembly in the provinces now forming part of the Dominion—that to Governor Cornwallis (o), of Nova Scotia. “For the better administration of justice, and the management of the public affairs of our said province,” the governor was authorized to appoint “such fitting and discreet persons as you shall either find there, *or carry along with you*, not exceeding the number of twelve, to be of our council in our said province. As also to nominate and appoint, by warrant under your hand and seal, all such other officers and ministers as you shall judge proper and necessary for our service, and the good of the people whom we shall settle in our said province until our further will and pleasure shall be known.” Subsequent appointments to fill vacancies in the council were to be made by the authorities *in England*. With the advice and consent of this council, the governor was empowered to establish courts of justice, and to appoint all the necessary ministerial and judicial officers in connection therewith. The public revenue was to be disbursed by the governor’s warrant, issued by and with the advice of the council, with this limitation, however, that it was to be disposed of by the governor “for the support of the government, and not otherwise.” It is hardly to be wondered at, having in view the mode of appointment, and of filling vacancies in this council, that the executive government of those days came to be designated by the familiar phrase—“the family compact.”

Turning now, to the part played in government by the assemblies, and referring again to the commission to Governor Cornwallis, we find him commanded to govern the colony according to his commission, the instructions therewith, or to be thereafter given (from England, of course), “and according to such reasonable laws and statutes as

hereafter shall be made or agreed upon by you, with the advice and consent of our council and the assembly of our said provinces."

The legislative power of the governor and assembly, is in terms ample: "To make, constitute, and ordain laws . . . . for the publick peace, welfare and good government of our said province . . . . and for the benefit of us, our heirs, and successors; which said laws are not to be repugnant but, as near as may be, agreeable to the laws and statutes of this our Kingdom of Great Britain." All such laws, however, were subject to disallowance by the Imperial authorities, with no limitation as to the time within which such disallowance should take place.

We shall have occasion to refer to the position of the Crown as a constituent branch of the Imperial parliament and of colonial assemblies, but the clause providing for this, in the commission now under examination, is noteworthy for the frank and undisguised fashion in which it discloses the reason. This clause is as follows:

"And to the end that nothing may be passed or done by our said council or assembly to the prejudice of us, our heirs and successors, we will and ordain that you, the said Edward Cornwallis, shall have and enjoy a negative voice in the making and passing of all laws, statutes, and ordinances, as aforesaid."

The importance of the concession to the early provinces, of the right to frame the laws by which, in local matters, they were to be governed, must not be under-rated. If it cannot be considered as in any fair sense a concession of the right of self-government, it must at least be admitted that it fell short, only because of the theory which then obtained, of the independence of the two departments of government, and because of the inability of the legislative bodies in the colonies to withhold supplies until grievances in the executive department were remedied.

We now proceed to Quebec, in order to examine the changes in the form of government, introduced there by

Imperial statutes. For eleven years after the Treaty of Paris, the commission to Governor Murray and his successors (read with the proclamation of 1763), was the charter of government; but, as we have already noticed, no assembly ever met in that province, and any legislation which was considered necessary was passed by the governor and his council. Owing to the discontent of the inhabitants, then largely French, at the introduction (which was claimed to have taken place) of English civil law, and owing perhaps to a doubt of the legality of the ordinances of the governor and his council, "The Quebec Act, 1774" (*p*), was passed by the Imperial parliament. Of this statute, it is necessary to make here only this note, that it revoked the right to a representative assembly, and lodged both departments of government, legislative and executive, in the hands of the governor and his council; with this provision, however, that the members of the council were to be appointed from the inhabitants of the province. A perusal of the Act discloses much milder checks on the legislative power than in the case of the earlier commissions;—no doubt because of the union of the legislative and executive powers of government in the same hands (*q*).

By "The Constitutional Act, 1791"—the province of Quebec having been divided by royal proclamation (or rather, the king having signified "his Royal intention to divide his province of Quebec into two separate provinces")—provision was made for the establishment, in each of the two provinces, Upper and Lower Canada, of a legislative council and assembly. Beyond giving the assembly so created, the right to legislate as to time, place and manner

(*p*) 14 Geo. III. c. 83.

(*q*) By the 13th sec. the Governor and his council were expressly prohibited from "laying" taxes or duties within the province, with the exception of local assessments for municipal purposes. By an Act of the same session (cap. 88) provision was made for raising a revenue by means of duties on rum, spirits, and molasses, to be disbursed by imperial officers. See the Act; Houston, Const. Doc. p. 97.

of holding elections to the assembly, and as to the officers by whom such elections were to be conducted (*r*), the Act would, upon cursory perusal, appear to give to the legislature no control over the executive, more than had been conferred on the assemblies in the Maritime Provinces; but there is one most important exception, to which particular attention must be given (*s*).

We have not, of course, overlooked the rule of law, that the consent of the Crown, by its representative in the colony, to any Act of the colonial legislature curtailing the power of the Crown in the exercise of any prerogative right, is as effective to that end as is an Act of the Imperial parliament, in similar case; but by reason of the refusal to concede to the colonies the control of the revenues raised therein, the colonial assemblies were unable to force consent to Acts in curtailment of prerogative. Not being able to starve the executive, they were unable to hold the officers of that department to responsibility for the due performance of their duties; and whether they had the confidence of the representative branch of the legislature or not, was a matter of perfect indifference to these executive officers. The importance, therefore, of this question of revenue and its expenditure—the power to make provision for a revenue and to appropriate it when raised, becomes more and more apparent as we proceed, and the question must now be dealt with.

The treatment accorded by Great Britain to her colonies, in the matter of taxation, was entirely regulated by the view taken in England of the necessities of Imperial "trade and commerce." At first, of course, the expense of governing the colonies was borne entirely by the home government, but as early as 1672 (*t*), the Imperial treasury levied tribute upon the colonies, by the imposition, by Imperial

(*r*) A parliament so firm in its claim to exclusive control over elections, as was the British Parliament at that time, could scarcely have done otherwise.

(*s*) See *post*, p. 39.

(*t*) 25 Car. II. c. 7.



Act, of export duties on certain articles shipped from the colonies for consumption elsewhere than in England; the proceeds of which duties were, of course, a set-off to the expense of government in those colonies. During the century which followed, Imperial Acts were from time to time passed, providing for the collection of both export and import duties, but always as part and parcel of the regulation of trade and commerce (*u*). In 1763, permanent provision was made with regard to these colonial duties, and it was provided that the net proceeds thereof should be reserved for the disposition of the Imperial parliament, "towards defraying the necessary expenses of defending, protecting, and securing the British colonies in America" (*v*).

This, then, was the position of affairs at the time when regular forms of civil government began to be established in Nova Scotia, Prince Edward Island, New Brunswick and Quebec. The abandonment by the Imperial parliament, of the principle that these duties were in the nature of regulations of Imperial trade and commerce only, and the extension of the Imperial power of taxation to matters of excise—to laying tribute, in other words, on internal trade—and the consequent loss of the southern half of this continent, is a familiar story. During the progress of the struggle, but too late to win back the revolting colonies, the Imperial parliament passed the celebrated Renunciation Act of 1778 (*w*), by which it was declared and enacted that "the King and parliament of Great Britain will not impose any duty, tax, or assessment whatever, payable in any of his Majesty's colonies, provinces and plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied

(*u*) 14 Geo. III. c. 88 (noted above) was a "revenue" Act. See *post*, p. 39.

(*v*) See Todd "Parl. Gov. in Brit. Col.," p. 169, *et seq.*

(*w*) 18 Geo. III. c. 12. This Act is, of course, powerless to bind the Imperial parliament; but it is a most emphatic expression of a "conventional" rule to be thereafter followed.



to and for the use of the colony, province or plantation in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts or general assemblies of such colony, province, or plantation, are ordinarily paid and applied," and this principle was followed until the free trade campaign in England, led to the abandonment of the system of taxing trade for the benefit of trade, and, with it, the regulation of colonial tariffs by Imperial legislation.

During this period, however, the practical result of the colonial system was this. With the exception of such sums as the colonial assemblies were minded to raise (usually by the imposition of customs duties), in order to the carrying on of public improvement and promoting settlement, the revenues which came to the hands of the executive were, (1) the proceeds of customs, excise and license duties, levied under Imperial Acts; and (2) the hereditary, territorial and casual revenues of the Crown, consisting of the proceeds of the sale or lease of the "waste" lands in the colonies, fines, tolls, etc. Over the revenues arising under colonial Acts, the colonial legislatures could, of course, and did insist on retaining power of appropriation, and, so far as these revenues were concerned, could withhold supplies; but their action in such case made no difference to the executive, however it might do harm to the colony. The cost of the administration of justice, and of civil government (including, as it did, the salaries of the entire executive staff, administrative and judicial), was paid out of the other two sources of revenue, and over these the colonial assemblies had for many years no power of appropriation or control. To secure control of the executive—to make them *feel* responsibility—it was indispensably necessary to get control of these revenues and their appropriation; and the history of the growth of the principle of "Responsible government" is the history of the gradual acquisition by the colonial legislatures of the right to appropriate revenue, from whatever source within the

colony arising. The "tenure-of-office" question practically depended upon this question of control over the purse strings.

In all the provinces, the real issue was somewhat obscured by reason of the fact that, under the then arrangement, the legislative council, or second chamber, acted as a shield to the governor and his executive council, and was interposed to bear the brunt of all attacks upon executive methods. In the earlier stages of colonial history, the executive council was really a branch of the legislature, and it always continued potentially so, by reason of its members forming the influential portion of the Crown-appointed legislative council. This position of affairs, however, gave the disputes between the legislature and the executive, the appearance of being disputes between the two branches of the legislature; and it is not surprising, therefore, to find that the efforts of Howe, Wilmot, Papineau, and Baldwin, were directly and ostensibly bent to secure reform in the constitution of the legislative council (*x*). The real issue, however, was the question of executive responsibility, and, as we have endeavored to point out, that question largely depended upon, and was ultimately solved by, the solution of the more sordid one as to control of expenditure. Perhaps, there was a lack, too, of proper appreciation of the way in which the principle of responsible government was working its way into the fibre of the British constitution—through the medium of cabinet government—and this may have tended to the adoption of the less direct route to the establishment of responsible government here. It needed men like Lord Durham and Charles Buller,<sup>?</sup> who were able to see through the intricacies of governmental machinery and discern the true principle of the British system,

(*x*) J. G. Bourinot, "Responsible Government in Canada"—a paper read before the National Club, Toronto, during the winter of 1890-91, and published *sub. tit.* "Maple Leaves," p. 43.

to point out how that same principle could be made effective in the colonial machinery of government.

The first concession gained, was of the power of appropriating the proceeds of Imperial tariffs in force in the colonies. As far back as "The Constitutional Act, 1791," this power of appropriation was expressly given to the legislatures of Upper and Lower Canada, over the proceeds of all customs duties levied as part of the commercial policy of the Empire; and this is the point of distinction between the powers of the colonial assemblies under that Act, and under the earlier commissions, to which reference was made a few paragraphs back (*y*). But the only Imperial tariff Act in force in Canada, was the Act of 1774—a *revenue* Act (*z*); and because that Act was contended not to come within the terms of "The Constitutional Act, 1791," express legislation was necessary to give the Colonial legislature control over the revenue arising under that Act. This was obtained in 1831 (*a*).

Still, however, in all the provinces, the "hereditary, territorial, and casual revenues" to which we have referred were amply sufficient to "pay the piper"; and so far as the salaries of all the executive "family-compact" staff were concerned, the legislature had power neither to fix nor withhold them. Secure in the enjoyment of the emoluments of office, the executive were able to thwart the wishes of the popular branch of the legislature, and to decline to recognize its right to control or regulate their mode of conducting public business.

The history of the struggles, which in the Upper Provinces culminated at one time in open rebellion, and in all resulted in the firm establishment of Responsible Government, is beyond the scope of this work; but it is curious to

(*y*) *Ante*, p. 35.

(*z*) See note *ante*, p. 36.

(*a*) 1 & 2 Wm. IV. c. 23. See Houston 'Const. Doc.' p. 106; Andrew v. White, 18 U. C. Q. B. 170.

note that the contemporary statutory record (*b*) appears in Acts relating to colonial control of colonial finances,—the “tenure of office” question appearing only in the “conventional” aspect of despatches, instructions, etc. (*c*). Not to dwell at undue length upon this point, we may mention shortly, that first to New Brunswick, and afterward to Canada, (1847), and Nova Scotia (1849), full control over the revenues from all sources was conceded; and having that full control, the Legislative Assemblies slowly, but surely, overcame the stubborn resistance, or active opposition of the governors of the early forties, and the principle of executive responsibility was firmly and permanently established in all the pre-Confederation provinces.

We are now, perhaps, in a position to define with some accuracy, the nature of the constitutions existing in the provinces immediately prior to the coming into force of the B. N. A. Act.

What Lieut.-Gov. Archibald has said (*d*) in reference to the constitution of Nova Scotia is clearly applicable to the other maritime provinces: “No formal charter or constitution ever was conferred, either on the province of Nova Scotia or upon Cape Breton while that island was a separate province. The constitution of Nova Scotia has always been considered as derived from the terms of the royal commissions to the Governors and Lieutenant-Governors, and from the “instructions” which accompanied the same, moulded from time to time by despatches from Secretaries of State, conveying the will of the Sovereign, and by Acts of the local legislature, assented to by the Crown; the

(*b*) 1 & 2 Wm. IV. c. 23 (Imp.); 8 Wm. IV. c. 1 (N.B.); 3 & 4 Vic. c. 35 (Imp.); 6 & 7 Vic. c. 29 (Imp.); 6 Vic. c. 31 (Can.); 9 & 10 Vic. c. 94 (Imp.); 9 Vic. c. 114 (Can.); 10 & 11 Vic. c. 71 (Imp.); 12 & 13 Vic. c. (N.S.); 12 & 13 Vic. c. 29 (Imp.); 15 & 16 Vic. c. 39 (Imp.); 17 & 18 Vic. c. 118 (Imp.) See *Mercer v. Atty.-Genl. of Ont.*, 5 S. C. R. at p. 700, *et seq.*, for an historical statement by Gwynne, J., on this subject.

(*c*) Todd, Parl. Govt. Brit. Col., pp. 25-6.

(*d*) Can. Sess. Papers, 1883, No. 70.



whole to some extent interpreted by uniform usage and custom in the colony."

In (old) Canada the form of government was prescribed by the Act of Union (e). But as to all the provinces, it can be truly said that their constitutions were modelled on the pattern of the parent state, both as to their governmental machinery and as to the principle on which they were operated. In outward form, there is a close resemblance between the British constitution and the constitution of those provinces—the same single executive, the same legislative machinery (even to a second chamber), with about the same apparent connection between the two departments of government. And upon inquiry further into the motive power and the mode of its application, we may say that just as in the case of the Imperial parliament, so here in the case of the pre-Confederation provinces, one will look in vain for any statute laying down the rules which shall govern in the matter of the formation, the continuance in office, or the retirement of the Cabinet. The "conventions of the constitution," whose slow growth had gradually culminated in the full recognition of the principle of executive responsibility to parliament, was by the simple method we have shortly described—by instructions to the governors—introduced as the working principle of the provincial constitutions.

Of the causes which led to the adoption by the provinces of the Resolutions of Quebec, upon which the B. N. A. Act is founded, it is for the historian to treat. So far as those causes affected the terms of the union, as to the distribution of the field of governmental action, we shall, of course, have occasion to refer to them hereafter. Here we need only point out, that in agreeing to the establishment of a "general" government, charged with matters of com-

(e) 3 & 4 Vic. c. 35 (Imp.)



mon concern, the provinces resolved that such general government should be modelled on the British constitution, and that its executive authority should be administered according to the well-understood principles of the British constitution. We may say, therefore, of both the Dominion and the provincial governments: "That great body of unwritten conventions, usages, and understandings, which have in the course of time grown up in the practical working of the English constitution, form as important a part of the political system of Canada as the fundamental law itself which governs the federation" (*f*).

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(*f*) Bourinot, 'Maple Leaves,' p. 37.

## CHAPTER III.

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### WHAT BECAME OF THE PRE-CONFEDERATION CONSTITUTIONS?

As justification for the last chapter, it was asserted that in order to establish the Dominion government, and the federal scheme of the B. N. A. Act, the slate had not been cleaned; and we shall endeavor to make good that justification.

In comparing the British and United States systems of government, the really federal character of the former—viewed as an Imperial constitution—was pointed out; but the gradual working out of the federal idea in the Imperial constitution (through continuous concessions of powers of self-government to the colonies) was contrasted with the studied action of the Fathers of the American Union, in taking this federal idea as the starting point of their departure (*a*). The reason is apparent. Thirteen self-governing communities occupied one compact territory; their inhabitants were of common origin, and had common interests; and they deliberately set to work to establish a “national” government, charged with the control of those matters which were deemed of common interest, but, just as deliberately, they insisted upon preserving their right to regulate their local concerns in their local assemblies. And so in relation to the enactment of the B. N. A. Act:—there

(*a*) See *ante*, Chap. I., p. 5, *et seq.*

was the same fact of pre-existing governments, the same desire for united action on matters of common concern, and the same deliberate refusal (based on the same desire to preserve local autonomy) to establish a legislative union, or what has been styled a "unitarian" system.

Opinions may very reasonably vary at different periods as to where the line should be drawn which is to divide matters of common or "national," from matters of "local" concern; and this variation in opinion is manifest in the assignment to our Dominion government of several subject matters, which, under the scheme of division adopted by the convention of 1787, were not assigned to their national government—for example, criminal law, and the law of "marriage and divorce" (b). When the idea of a Canadian Confederation began to take practical shape, the United States was in the throes of its civil war, and the notion was prevalent that that war had been caused by the weakness of the "national" government, arising from including among "state rights" the "*residuum of power*," as it has been termed. That the war was not caused by any such defect in the division of the field of governmental action was then pointed out (c), and has been since fully demonstrated; but the prevalence here of that notion led the fathers of confederation to desire a strong central government, and to that end the "*residuum of power*" is, under the B. N. A. Act, with the Dominion government (d). This fact has been much utilized in argument, to belittle the sphere of authority of the Provincial governments, and because, as it is put, these latter are governments possessing only "enumerated powers,"

(b) That the assignment of these (as matters of common concern requiring uniformity of treatment) to the "national" government is more consonant with modern ideas, is apparent from the numerous expressions of opinion from across the line, in favor of an amendment of the U. S. constitution in these particulars.

(c) See the speech of Mr. C. Dunkin—Confed. Deb., p. 491.

(d) See sec. 91.

the argument is pushed to this length, that the constitutions of the pre-Confederation provinces were, by the B. N. A. Act, completely wiped out, and that the powers, both legislative and executive, of the post-Federation provinces—and without regard to any necessary connection between these two departments of government—are such only as are to be found expressly set out in the B. N. A. Act. If that is the result of the enactment, never did legislation fail more egregiously in carrying out of the design of its promoters. The Quebec Resolutions convey no hint that the negotiating provinces desired more than to establish a “federal” union on terms which would be just to the provinces, and leave their autonomy, as to matters local, unimpaired. But these Resolutions, if proper to be referred to at all, can perhaps be cited to aid only in the construction of doubtful or ambiguous phraseology in the B. N. A. Act (*e*), and, therefore, the terms of the Act itself must be looked at carefully on this point. But, first, it is necessary to advert to the inaccuracy of the phrase, “*residuum of power*.” As has already been pointed out, there is not, under a federal system, any necessary division of *power*, in the proper sense of the term; the essential division which exists, being a division of the subjects proper for governmental regulation, into two classes of matters—matters of “national,” and matters of “local” concern. Just what matters belong to the one class, and what to the other, is a question upon which, as we have said, opinion may vary, but whether the matters of “national” concern are enumerated, and the residuum left as of “local” concern (as by the U. S. constitution), or the matters of “local” concern enumerated, and the residuum left as of “national” concern (as is partially the case with us), is matter of indifference, so long as the enumerated class is sufficiently comprehensive to satisfy public opinion, at the time, as to the proper line of division. But what is essen-

(*e*) See *post*, Chap. X.

tial, is, that to the full limits of the matters entrusted to each government, national or local, the power of governmental action should be full and complete. It will be noticed, of course, that the division effected by the B. N. A. Act is a division of matters for legislative action, but this must involve a division along the same line for executive action. Any other arrangement would be a clear departure from that principle of the British constitution, upon which we have dwelt at some length in earlier pages—the supremacy of the maker of a law over the executor of that law—a principle which is dominant in every Anglo-Saxon community, unless, indeed, Canada is now, as is claimed, the exception. ✓ ∴

That principle, as we have pointed out, clearly obtained in the pre-Confederation provinces as the result of the long struggle for “responsible government,” and it is important therefore to ascertain whether, under the B. N. A. Act, the provincial constitutions *continue*; for if so, then the same connection between the legislature and the executive, which existed before confederation, must still continue with respect to the subjects of provincial cognizance.

Any complication which may exist in connection with this question has arisen from what has been termed “the necessities of the draftsman.” One cause of the support given in the two parts of (old) Canada, to the scheme propounded by the Quebec Resolutions, was that it made provision for the severing of the tie of legislative union between them; and the carrying out, in one Act of parliament, of this design and the larger federal scheme, necessitated first the severance of that tie, and then the creation by the Act of a federal union between the *four* provinces. But, while on the one hand this necessity, and the mode of meeting it, adopted in the Act, has provided a small peg on which to hang an argument adverse to the provinces (*f*),

(*f*) As a matter of construction, it would appear that secs. 5, 6 and 7, point merely to the territorial limits to be assigned to the different provinces of the Confederation.



it has also provided several others, upon which a very strong argument may be heaped, in support of the full autonomy of the provinces in relation to the subjects allotted to them. Old Canada being thus divided into its original divisions,—with new names,—it became necessary to make provision for the establishment of new governmental machinery, legislative and executive, in Ontario and Quebec. Eliminate from the Act all clauses inserted to this end; consider Ontario and Quebec as having had governmental machinery such as existed in the Maritime Provinces; and the Act would clearly appear as an Act for the establishment of *federal* machinery only, for drawing the line of division between matters proper for the consideration of the “general” government, and those proper for the consideration of the “local” governments, and for the making over to the federal government of certain portions of the assets and revenue-producing powers of the provinces. The very use of the term *federal* in connection with the creation of a central government for territory occupied by previously existing governments, mutually independent, would seem to imply the continued existence of the individual governments, parties to the *fœdus*; and the fact that no provisions were made for Nova Scotia and New Brunswick, similar to those made for Ontario and Quebec, would appear to point to the conclusion that the governmental machinery of those provinces was to continue as before, employed, of course, upon a somewhat smaller range of matters.

*fi fi!*

The type of governmental organization in the pre-Confederation provinces was one and the same—a single executive head (assisted by an executive council), and a legislature (*g*)—and the principle upon which the whole worked in the actual government of the provinces was the principle of executive responsibility to the electorate

(*g*) The existence or non-existence of a second chamber is in no way material.

through the legislature. The B. N. A. Act makes provision, as to all the provinces, for a single executive head in each, but judging from the absence of any provision for the appointment of the Governor-General, it may be doubted if such provision would have been *expressly* made in regard to the Lieut.-Governors, had it not been intended to alter the mode of appointment, so as to make each provincial executive head, a link in the chain of federal connection (*h*). As to the "powers, authorities, and functions" of that executive head, they are particularly mentioned only as to Ontario and Quebec (*i*), and as to those two provinces only so far as they were dependent for their existence *upon statutes*, either of the Imperial parliament or the parliaments of (Old) Canada. This latter limitation has been urged as supporting the view that certain of the "powers, authorities, and functions"—those depending for their efficacy *upon the common law*—exercisable by the Governors (or Lieutenant-Governors) of the pre-Confederation provinces, are now, even as to matters within the legislative authority of Ontario and Quebec, exercisable only by the Governor-General.

We shall deal with this contention in a moment, merely remarking now that such a construction of the Act, would create diversity in the position of the different provinces, and would be a departure from the principle insisted on, as apparent throughout the British constitution—the co-extensive and complementary sphere in government, of the executive and legislative departments. The matter material to be now noted is, that these *statutory* powers had been conferred upon the holder of a particular office which was now to be divided, and therefore a statutory re-allotment, so to speak, had to be made. The language of the section to which we are now referring (sec. 65), and of what may be called its companion section (sec. 12), bears out, too, our

(*h*) Compare secs. 10 and 58, B. N. A. Act, 1867.

(*i*) B. N. A. Act, sec. 65.

criticism of the phrase, "division of power," inasmuch as both sections carefully avoid using any such term as "division." Treating the "powers, authorities, and functions" conferred by previous legislation as a sum total, they carefully provide that *all* these powers, etc., so far as they are capable of being exercised after the union, in relation to the government of the Dominion and the provinces respectively, shall be vested in the Governor-General, or in the Lieutenant-Governors, as the case may require.

To revert now to the argument founded on the limitation of sections 12 and 65 to statutory "powers," etc. We have already indicated "the necessities of the draftsman," as the reason for their insertion in the Act. But for that necessity, they would not have appeared, and we should have to look to some other part of the Act in order to ascertain the position of the executive head of the different provinces, as, indeed, we have to do with reference to Nova Scotia and New Brunswick. If there were no express provision, we should still contend that, as executive head of the province, a Lieutenant-Governor is invested with all the "powers, authorities, and functions" necessary to carry on the government of the province—that wherever provincial legislation requires, in order to its complete and efficient enforcement, the sanction of executive action, all the "powers, authorities, and functions" (prerogative and otherwise) necessary to such enforcement, reside in, and are exercisable by, the executive head of the provincial government (*j*). But we are not limited to this application of legal principles, incontestable though they be. Sec. 129 of the B. N. A. Act is clear upon this matter:—

"Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick, at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, *powers and authorities*, and all officers, judicial, administra-

(*j*) See judgment of Burton, J.A., in *Atty.-Gen'l (Can.) v. Atty.-Gen'l (Ont.)*, 19 O. A. R. 38.

tive and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made, subject nevertheless (except with respect to such as are enacted by, or exist under, Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this Act."

The language of this section is very comprehensive. It continued the whole body of pre-existing laws and legal institutions, "except as otherwise provided by this Act"; and excepting Imperial Acts and institutions existing under Imperial Acts, it divided the entire field of *law* (in its widest sense) between the Dominion and the provinces, "according to the authority of the parliament or of that legislature under this Act." This body of law would include every branch of jurisprudence—the *lex prerogativa* as well as the other branches. Combined with sec. 12, it carries the whole executive power incident to the legislative sphere of authority of the Dominion parliament, to the Dominion; and, combined with sec. 65, it has precisely the same result in relation to the government of the provinces (*k*).

With regard to the executive council in each province—in other words, *the Cabinet*—we have to point out that no provision is made for such a council in New Brunswick or Nova Scotia, beyond what may be gathered from the express enactment that the *constitution* of the executive authority in those two provinces, should *continue* as before the passing of the B. N. A. Act; while, in regard to Ontario and Quebec, the appointment of the first officers who are to constitute the executive council in those provinces is provided for. There is this difference, too, to be remarked between the section of the Act which provides for the

(*k*) *Dobie v. Temporalities Board*, L. R. 7 App. Cas. 136; and see notes to B. N. A. Act, secs. 12, 65 and 129, *post*.



Privy Council of the Dominion (sec. 11) and the corresponding section as to the executive councils of Ontario and Quebec (sec. 63), namely, that the latter seems to take it for granted (if we may use the expression), that there is to be an executive council in those two provinces; while the former distinctly provides that "there shall be" a Privy Council for Canada. It may here be remarked that nowhere in any statute book will be found any Act which lays down that such executive council shall continue to hold office only so long as it commands the confidence of the legislature; but the existence of that "convention of the constitution," and its *raison d'être*, have been already dealt with at sufficient length, and no one, we fancy, would argue that any significance attaches to its absence from the B. N. A. Act.. As put by Lord Russell, in his famous dispatch (l), of September 7th, 1839, conveying to Lord Sydenham his "instructions" as to the government of Upper Canada: "It is evidently impossible to reduce into the form of a positive enactment, a constitutional principle of this nature." But not only is the appointment of the first members of the Cabinet provided for in the case of Ontario and Quebec, but provision is also made as to their "rights, powers, duties, functions, responsibilities or authorities"—the draftsman was certainly exhaustive in his phraseology—and what has just been said as to the sections dealing with the powers, authorities and functions of the executive head, is equally applicable to sec. 135, which makes this provision as to the executive officers under him. All the "powers, etc., etc.," which the executive officials named, had in relation to the government of Canada, are to be vested in the officers of the provincial governments, in relation to those governments. There is no division of *power*, but of sphere of authority only. gosh!

Equally significant of the continued existence of the pre-Confederation constitutions, are the clauses of the Am

(l) Can. Ass. Jour., 1841, pp. 390-6, App. BB.



B. N. A. Act, dealing with the constitution of the legislative authority in the provinces (*m*). For Ontario and Quebec, legislatures had to be provided. The constitution of those legislatures is, of course, entirely the creation of the B. N. A. Act; but, so far as the creative clauses are concerned, there is nothing to indicate any difference in principle, between the constitution of those legislatures, and the constitution of other colonial legislatures, beyond the absence in the "constitutional" statutes relating to those other colonies, of any division of the sphere of their legislative authority. But for Nova Scotia and New Brunswick no legislatures were created, it being provided (just as had been provided with regard to the executive) that the constitution of the legislature of each of those provinces should *continue* as it existed at the Union. The House of Assembly of Nova Scotia, as it happened, had been dissolved, so that new provincial elections were necessary, and, in order to save expense, it was provided (*n*) that such new elections should take place at the same time as the first elections for the House of Commons of the Dominion. But, as to New Brunswick, its House of Assembly was still alive, and it was expressly provided that it should continue (unless sooner dissolved) for the period for which it had been elected. As to both Nova Scotia and New Brunswick, the B. N. A. Act contains no provision for the summoning of their Assemblies, for the length of time they should live, for yearly sessions, or as to the conduct of their business; as to all of which matters, minute provision is made as to the legislatures of Ontario and Quebec (*o*).

The group of clauses (*p*) of the Act, dealing with the division of the assets of the provinces, between those provinces and the Dominion, bears throughout marks of the

(*m*) Secs. 69-90.

(*n*) B. N. A. Act, sec. 89.

(*o*) Note, however, sec. 92, s-s. 1, *post*.

(*p*) Group VIII, secs. 102-126.

draftsman's idea that the pre-Confederation provinces *continued*;—they “shall retain all their respective public property not otherwise disposed of in this Act” (*q*); and certain duties and revenues are “reserved to the respective legislatures of the provinces (*r*).”

The division of the group of miscellaneous provisions (*s*) into “general,” and “Ontario and Quebec” is in itself significant, and the absence of provisions for New Brunswick and Nova Scotia, similar to those made to meet the needs of the newly created governments of Ontario and Quebec—provisions as to the executive staff; as to the Great Seals to be used; as to the construction of temporary Acts of the parliament of old Canada, etc.—would seem to make it perfectly clear that the constitutions of the pre-Confederation provinces “by the sea,” at all events, were not intended to be destroyed, and at most, it can only be said, that the constitution of old Canada was re-cast and made into two, each on the same pattern as the one had previously exhibited.

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Upon consideration, it would appear that the really essential point to be determined in connection with this controversy, is the actual presence in the provincial machinery of government (in their *constitutions*, in other words,) of the same working principle as was present in the constitution of the pre-Confederation provinces. As to, Nova Scotia and New Brunswick, there can be no doubt, as the B. N. A. Act is distinct, that the constitution of the executive and legislative authority in those provinces—and these two departments comprise the whole round of government—shall *continue*; and the controversy must therefore be limited to Ontario and Quebec. And as to these two provinces, it has already been remarked that the clauses which create their legislative and executive machinery

(*q*) Sec. 117.

(*r*) Sec. 102; and see also sec. 126.

(*s*) Group IX.; secs. 127-144.

differ in no essential respects from the similar clauses in other Imperial Acts creative of colonial constitutions, the presence in which of the principle of the co-extensive and complementary nature of the executive and legislative powers in government, cannot be gainsaid. No Act, Imperial or Colonial, has ever expressly so enacted; but it is the legal principle of the British constitution, and of the colonial constitutions of the Empire as well. And when we find, as a comparison of the various "constitutional Acts" for the colonies will show, that the machinery of government provided by those Acts is "all of a piece," an argument is afforded in favor of, rather than against, the existence of the same working principle in each. Compare, for instance, the clauses of the B. N. A. Act, creating the executive and legislative machinery of the Dominion government, with those creating the like machinery of the governments of Ontario and Quebec, and both sets of clauses with the similar provisions of the Acts relating to (say) the Australasian colonies, and no essential difference can be found (*t*)—nothing to indicate that in one the law-making power is supreme over the authority which executes that law, and that in another the two are not co-terminous. The fact is, that government is one, and indivisible. The "sanction" of a law is executive action, and no impossible attempt to create two independent powers in relation to any given subject matter, is made by any of these "Constitutional Acts."

(*t*) Compare B. N. A. Act with the Union Act (3 & 4 Vic. c. 35), and with the Constitutional Acts of New South Wales (5 & 6 Vic. c. 76; 7 & 8 Vic. c. 74; 13 & 14 Vic. c. 59, etc.); of Victoria (13 & 14 Vic. c. 59; 18 & 19 Vic. c. 55, etc.); of Newfoundland (5 & 6 Vic. c. 120; 10 & 11 Vic. c. 44), and of Queensland (24 & 25 Vic. c. 44). See Forsyth, Constitutional Law, p. 27, for an enumeration of the various "Constitutional Acts" for the colonies.

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PART II.

THE RESULTS OF OUR COLONIAL STATUS.

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## CHAPTER IV.

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### WHAT IMPERIAL ACTS AFFECT US?

While we have, in the preceding chapters, endeavored to distinguish clearly between the *law* and the "*conventions*" of the constitution, we have necessarily had to deal with both. In the light of the conventions of the constitution, the parliament of the United Kingdom has been described as a legislature possessed of a dual nature, partaking of the character both of an "Imperial" parliament and of a "local" parliament for the United Kingdom. It must be again admitted, however, that although, by those usages and precepts of the constitution, the field of governmental action properly to be occupied by the Imperial parliament, is practically though not yet perhaps very definitely limited, the *law* of the constitution recognizes no limit capable of judicial enforcement.

For the whole British Empire, legislative sovereignty resides in the Imperial parliament, and when that body undertakes to legislate for the colonies generally, or for any one of them in particular, its enactments are a law unto such colony, binding on its inhabitants, and peremptorily requiring recognition by the judges in its courts (*a*); and no colonial legislature has power, directly or by a side wind, to alter, in one jot or tittle, any such Imperial enact-

(a) Letter by Historicus, in *London Times*, June 1, 1879; Dicey, *Law of the Const.*; Clark, *Colonial Law*, 10.

ment (b). That, in certain instances, colonial legislatures have been empowered by Imperial legislation (c) to exclude their particular colony from the operation of some particular Act—usually upon terms—is the exception which proves the rule. It must be kept clearly in mind, that we are not now discussing the “conventional” limits set to this legislative sovereignty. For the judge and the lawyer, there are no limits; for them there is, in the performance of their respective duties, no escape from the “literary theory.” They have to do with *legal* rights; and, for Canada at least, legal rights are, in the ultimate analysis, founded upon Imperial enactment. By Imperial enactment, we enjoy representative government; by Imperial enactment, that enjoyment could be (as once indeed it has been) taken from us; by Imperial enactment, the legislative power conferred upon our parliaments, has been more or less limited; by Imperial enactment only, can a change be effected in those limits. No power, even its own, can tie the hands of the Imperial parliament (d); and the boundaries set to colonial freedom of action in one session of that parliament may be enlarged in the next, and again restricted in a third. And as in these larger matters, so in any the smallest question (e) involving the legal rights of the individual, if she will, she legally may, and every British judge, in every part of the British Empire, is bound to give effect to the expressed will of the Imperial parliament. So well settled is the paramount legislative authority of the Imperial parliament, that English judges have not hesitated to lay it down that:

“If the legislature of England in express terms applies its legislation to matters beyond its legislative capacity,

(b) *Craw v. Ramsay*, Vaugh., 292. See *post*, Chap. IX.

(c) *E. g.* 9 & 10 Vic. c. 94, empowering the colonies to repeal Imp. tariff Acts.

(d) *Auchterarder case*, Mac. & R. (H.L.) 238; Dicey, *Law of the Const.*, 61.

(e) Such, for instance, as arose in *Gordon v. Fuller*, *infra*.

an English court must obey the English legislature, however contrary to international comity such legislation may be" (f).

It may perhaps seem that we have dwelt with undue emphasis on this point, but a glance at some Canadian authorities will make it apparent that, even on the bench, the legislative omnipotence of the Imperial parliament—perhaps we should rather say the legislative impotence of our colonial legislatures to alter an Imperial enactment—has not been admitted in its entirety without much discussion. Moreover, a clear recognition of this fundamental fact in the structure of the Canadian constitution, should tend to make our statesmen all the more careful that the limits within which this omnipotence is to have "conventional" scope, are clearly defined. The ultimate legal power—whose mandates must be judicially enforced—residing abroad, our right of self-government should not depend on uncertain usages, but on clearly expressed guarantees.

How are we to know when an Imperial Act extends by its own inherent force to a colony? It was never contended that English statutes were operative beyond the bounds of the United Kingdom, unless, upon a reasonable construction, there appeared the intention that they should so operate (g). For a long time this question of construction was unaffected by any statutory enactment, but at the present time the Imperial Act, 28 & 29 Vic. c. 63, provides the canon of construction—"An Act of parliament or any provision thereof shall . . . be said to extend to any colony, when it is made applicable to such colony by the express words or necessary intendment of any Act of parliament."

(f) *Niboyet v. Niboyet*, L. R. 4 P. D. 20; and see *Reg. v. Keyn*, L. R. 2 Ex. D. 152, 160, 207; *Reg. v. Anderson*, L. R. 1 C. C. R. at p. 167.

(g) 1 Blackstone, 107, *et seq.*; *Santos v. Illidge*, 8 C. B. N. S. 869, 887; *Routledge v. Low*, L. R. 3, E. & I. App. 113; *Penley v. Beacon Assce. Co.*, 10 Grant 423; *Sussex Peerage Case*, 11 Cl. & F. 146. See further on this point, *post*, Chap. IX.



A very different question this, from the question, how far English statutory law, of no expressed colonial application, has been, by Imperial grant or colonial adoption, embodied in the legal system of a colony. We are now dealing with Acts of the Imperial parliament, which, when passed, were, by "express words or necessary intendment," made applicable to our colony. The former question will be found treated in subsequent pages; but it may now be mentioned that, as a general rule, it is limited to a consideration of the English statutory law as it existed at the time of the introduction of English law into the colony. Imperial enactments of a general character, passed subsequently to such introduction, are not operative within the colony (*h*). But it follows from what has already been laid down, that there can be no time limit with regard to the class of Imperial enactments now under discussion. Of course, in the case of statutes passed prior to the acquisition of a colony, there must be the "express words or necessary intendment" requisite to make such enactment applicable to colonies to be thereafter acquired; but it is simply a question of construction—an enquiry as to the intention of the Imperial parliament.

It also necessarily follows from what we have said, that any colonial enactment inconsistent with an Imperial enactment on the same subject—which is the earlier and which the later, makes no difference—is inoperative; and so far did the English authorities carry this doctrine of "repugnancy," that colonial enactments inconsistent with the principles of the English common law, as well as those inconsistent with Imperial enactments (of the class we are now discussing), were considered inoperative; and "repugnancy," in one portion even, was considered to invalidate

(*h*) *Harrison v. Spencer*, 15 O. R. 692—the "Thellusson Act," 39 & 40 Geo. III. c. 9 (Imp.); *Rex v. Vaughan*, 4 Burr, 2500; and cases cited in last note; and see *James v. McLean*, 3 Allen, 164 (Nova Scotia), in which 2 Geo. II. c. 23 (Imp.), was held not to apply to a colony settled before the Act was passed.

the whole of a colonial enactment. It cannot be said that the authorities were clear to the extent mentioned, but there was a respectable opinion tending in that direction (*i*). The Act to which we have already referred (commonly known as "The Colonial Laws Validity Act, 1865," ) was passed to clear away these uncertainties. It recites that doubt had been entertained respecting the validity of divers laws enacted, or purporting to be enacted, by colonial legislatures, and respecting the powers of such legislatures, and after laying down the canon of construction already quoted it enacts :

"II. Any colonial law, which is or shall be repugnant to the provisions of any Act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of parliament, or having in the colony the force or effect of such Act, shall be read, subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

"III. No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of *England*, unless the same shall be repugnant to the provisions of some such Act of parliament, order, or regulation, as afore-said " (*j*).

Commenting on this Act, Willes, J. (in delivering the unanimous judgment of the seven judges of the Exchequer Chamber, in *Phillips v. Eyre*, involving a consideration of a certain "Act of Indemnity" passed by the legislature of Jamaica), says (*k*) :

"It was further argued that the Act in question was contrary to the principles of English law (*l*), and, therefore, void. This

(*i*) *Bowman v. Middleton*, 1 Bay, 252. This limitation has even been suggested as applying to Imperial legislation—12 Rep. 76; see Dicey, *Law of the Const.*, 59, note 1.

(*j*) 28 & 29 Vic. c. 63 (Imp.).

(*k*) L. R. 6 Q. B. at p. 20.

(*l*) Because *ex post facto* legislation. See *In re Goodhue*, 19 Grant, 366; and *post*, Chap. IX.

is a vague expression, and must mean, either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign state. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an Imperial statute, or order made by authority of such statute, applicable to the colony by express words or necessary intentment; and that, so far as such repugnancy extends, and no further, the colonial Act is void. . . . To what Act, order, or regulation, then, is the Jamaica Act of Indemnity and oblivion repugnant? (*m*) . . . It was further objected that the colonial law was contrary to natural justice, as being retrospective in its character, and taking away a right of action once vested, and that for this reason, like a foreign law against natural justice, it could have no extra-territorial force."

This objection, too, was overruled; but, as we shall have to touch upon this particular class of objection to colonial legislation at a later stage, we omit further comment here.

As we have already intimated, it has been seriously contended in the courts of this country that, under what is known as the Constitutional Act, 1791 (*n*), the Imperial parliament had—so far, at least, as concerns Imperial statutes of a date prior to its passage—given to the legislatures of Upper and Lower Canada power to annul, by direct repeal or inconsistent enactment, Imperial legislation of express colonial application.

✓ In 1836, in the case of *Gordon v. Fuller* (*o*), it was decided that the first section of the Imperial Act, 5 Geo II., c. 7 (to the fourth section of which we trace our *fi. fa.*

(*m*) See further, as to what constitutes "repugnancy," *Reg. v. Sherman*, 17 U. C. C. P. 167. *Reg. v. Slavin*, *ib.* 205, seems to lay down bad law (pp. 210-11), that, because a Canadian Act is later than an Imperial Act, "the question as to any conflict between them does not arise." *Reg. v. Sherman* seems to foreshadow this error.

(*n*) 31 Geo. III. c. 31 (Imp.). (*o*) 5 U. C. Q. B. (O. S.) 174.

lands) (*p*), respecting affidavits to be made in England for proof of debts sued for in this colony, was not repealed by the provincial Act, (32 Geo. III. c. 1, s. 5), but from the judgment of the court, Mr. Justice—afterward Chief Justice—Macaulay dissented; and, in order to appreciate the force of the opinion delivered by Chief Justice Robinson in support of the judgment of the court, we quote first from that dissenting opinion; and, as these earlier opinions contain a large amount of clear and instructive historical statement in reference to the early constitutional history of this country, we venture to give them somewhat at length. Mr. Justice Macaulay says:

“In 1791, the 31 Geo. III. c. 31, in contemplation of a division of the provinces, provided the present constitution, and forms the source from which the powers and authorities of our provincial statutes flow. It authorized the formation of local legislatures, and enacted that his Majesty should have power, with the advice and consent of the legislative council and assembly in each province, to make laws for the peace, welfare, and good government thereof, not being repugnant to that Act. All which laws are thereby declared to be, by virtue of and under the authority of that Act, valid and binding to all intents and purposes whatever, within the provinces respectively . . . . The two principle questions are—1st. Whether the provincial legislature possessed the power to subject suitors in actions for money demands, resident in England, to the *lex loci* in this respect—to the same rules of evidence prescribed for the inhabitants of the colony and all others; in other words, to remove the operation of 5 Geo. II. c. 7, from this province as a rule in such cases, or to introduce incompatible regulations on the same subject. And if so—2ndly, whether by implication (for it is not done in express terms) such effect has been accomplished. The statute 5 Geo. II. does not include all suitors and witnesses living in England, but extends only to cases of debt or account, and

(*p*) See the very interesting case, *Gardiner v. Gardiner*, 2 U. C. Q. B. (O. S.) 554, in which the right of a creditor to sue out a *fi. fa. lands*, is exhaustively discussed.



perhaps contemplated only those contracted in England. First, as to the power: I consider it imparted by 31 Geo. III. c. 31, which is very comprehensive, and almost unlimited in its terms: . . . . Subject to the exceptions therein expressed, I do not see that the powers of the colonial legislatures are otherwise abridged, so far at least as respects the laws in force at the time it was first organized, however liable to control by subsequent Imperial statutes, naming the province, or including it in a more general allusion to the North American possessions . . . . The King has almost unqualified power to make laws, binding upon and within the province, with the advice and consent of the legislative council and assembly; not as a mere prerogative right, or under a system of government established by commission as a royal government emanating from the grace and prerogative powers of the Crown, but by virtue of a British statute, which says that all laws so made (if not repugnant thereto) shall, by virtue of that Act, be valid and binding; and in order not to abridge the superintending control of his Majesty's government, a double negative is granted to his Majesty, who may annul and disallow Acts, although assented too in his name by the governor or lieutenant-governor representing him in his provincial parliament here. With these and other such qualifications and safeguards as the Imperial parliament deemed expedient, free scope is given to the action of the colonial legislature in all other respects; so much so, that *I cannot but regard the provincial statute, when duly passed, of equal force within the province with British statutes*, when not repugnant to 31 Geo. III. c. 31. In other words, I feel constrained to read the fifth section of our first Act (q) as if it had been incorporated in 31 Geo. III. c. 31, and formed one of its provisions, and conceive it competent to the provincial parliament (as a mere question of power) to exclude the operation of 5 Geo. II. c. 7, in any or in all respects by an Act duly assented to by or on behalf of his Majesty; and, if so, to produce the same effect by implication arising from the introduction of incompatible or other contradictory regulations. . . . The second inquiry—whether this clause of it has been excluded. No provincial Act mentions it by name, and, conse-

(q) 32 Geo. III. c. 1 (U. C.), introducing English law into Upper Canada.

quently, if effected, it must be by implication. I have already quoted the clause of our first Act, which, in furtherance of the previous clauses adopting the law of England, prescribes the rule of evidence and the forms thereof. . . . Regarding the whole scope and spirit of our provincial Act, from the first to the last, so far as respects the general adoption of the law of England, it appears to me that 5 Geo. II. c. 7, s. 1, was not repealed, but excluded from operation here by implication, especially by the 5th section introducing inconsistent provisions."

And he proceeds to intimate his opinion that the Imperial statute, 6 Geo. IV. c. 114, which declares void all laws, by-laws, usages, or customs, repugnant to that or other British Acts, referred only to 'laws, usages, etc., founded upon the old systems of colonial government by charter or otherwise,' and not to laws made by colonial assemblies constituted under an Imperial statute.

Chief Justice Robinson, in delivering the judgment of the court, says :

"As a general principle bearing on our introduction of the English law, civil and military, I think . . . that this general adoption (r) of them was not intended to supersede any particular provision that had before been made in respect to a certain matter, by a competent legislative authority, applying itself particularly to the colony. It was an Act to give a general rule in cases not specially provided for. On the other hand, I think this provision of 5 Geo. II. c. 7, does not come within the 46th section of 31 Geo. III. c. 31 ; and that if it depended on the question whether that clause (and that clause only) disabled our legislature from repealing it, it would not now be in force. To receive such an affidavit in proof of debt at the trial does certainly militate against the rules of evidence as established in England, and, therefore, after the passing of our provincial statute, 32 Geo. III. cap. 1, it cannot be admitted, unless, 1st, it can be held that the repeal of the British statute, 5 Geo. II. c. 7, is not within the intention of the statute 32 Geo. III. cap. 1 ; or, 2nd, *was not within the power* of the colonial legislature."

(r) i.e. by 32 Geo. III. c. 1, (U. C.)

Then, upon a consideration of the provincial Act, 32 Geo. III. c. 1, he concludes that there is no evidence of intent to repeal; and proceeds:

“Secondly.—If the legislature intended the repeal, had they the power?

“1st. The direct effect of such repeal would be to take from persons resident in Great Britain, conveniences secured by an express British Act of parliament to them, and them only; and I cannot conceive that 31 Geo. III. c. 31, gives to this legislature such a power. . . . Nothing can be more repugnant to any Act than an attempted repeal of it, and the consequence of being illegal and void must follow, unless the effect of 31 Geo. III. c. 31, is to make our legislature independent of the provisions of the imperial statutes respecting ‘repugnancy.’ It may be contended that it has that effect—1st, because parliament delegated the power to make laws for the colony to our legislature, having the concurrence of the King; and that all that is done by this delegated authority (within their scope) is to be regarded as if done by the British parliament on the principle of execution of powers. 2nd. By specifying . . . certain exceptions to this power, which do not embrace such a subject as that in question, we must take it there are to be no other exceptions, and that all laws passed in this province not coming within the exceptions . . . and not repugnant to the constitutional Act which creates the power, must be within the competence of our colonial legislature. But to this, I answer—1st. That the power is to make laws to operate directly only on the peace, welfare, and good government of this province (though indirectly they may affect—which is inevitable—persons resident out of it), and that it does not reasonably extend to the repeal of an Act of the British parliament expressly passed to afford facilities to British subjects resident in England. . . . 3rd. That the British parliament did not mean to give to this colonial legislature, authority to repeal Acts of parliament prior to 31 Geo. III. expressly binding in the colony (and especially such as did not concern the colony merely), is evidenced in the strongest manner by 6 Geo. IV. c. 114, s. 49 . . . . for it provides expressly that all laws in force or practice in any

vast Empire, having other colonies exercising similar legislative powers to our own. If any one colony, by passing laws, or refusing to pass laws, produced a state of things which created difficulty with a foreign state, the whole nation might be involved in a calamitous war from the imprudence or recklessness of a very unimportant colony. Considered in this light, it appears to me that the statute which we are discussing relates to the conduct of citizens of the Empire towards foreign states and people, and is on a subject which must be disposed of and legislated upon by the Imperial parliament, as representing the supreme legislative power of the nation, and as to which it is necessary that all the subjects of the Crown should alike be bound. The very preamble of the Act states that the proceedings which the statute prohibits may be prejudicial to, and endanger the peace and welfare of the Kingdom."

And again, in *Reg. v. Taylor (w)*, Chief Justice Draper, in considering the term "exclusive," in the 91st section of the B. N. A. Act, construed it as "intended as a more definite or extended renunciation, on the part of the parliament of Great Britain, of its powers over the internal affairs of the new Dominion than was contained in the Imperial statutes, 18 Geo. III. c. 12 (*x*), and 28 & 29 Vic. c. 63 (*y*)," overlooking apparently the fact that such a renunciation would be of no legal effect whatever in restraining future parliaments from legislative interference in the internal affairs of Canada, if so ill-advised as to take such an "unconventional" step. This interpretation of that term "exclusive" has, in subsequent cases, and by other judges, been very emphatically dissented from, and the general principle of the legislative supremacy of the Imperial parliament clearly laid down (*z*).

(*w*) 36 U. C. Q. B. at p. 220.

(*x*) The celebrated Renunciation Act; see *ante*, p. 36. As to the legal effect of this renunciation, see charge of Blackburn, J., in *Reg. v. Eyre*, reported by Finlayson.

(*y*) The Colonial Laws Validity Act, 1865.

(*z*) *Smiles v. Belford*, 1 O. A. R. 436; *Reg. v. Coll. of Phys.* 44 U. C. Q. B. 564.



In the Maritime provinces, where Imperial Acts relating to navigation were frequently invoked in the Vice-Admiralty Courts existing in those provinces, a clearer view seems to have prevailed as to the operation, within the colonies, of such Acts; and numerous cases are to be found in which, without question, effect was given to their provisions. It would appear, however, that the view was pressed in argument there, just as it was in the courts of the upper province, that a provincial Act, assented to by the Crown, was of equal validity with an Imperial Act, and if later in point of time than an Imperial Act with which it might appear to clash, it should be given effect to, in preference to such Imperial Act. In the case of "The Bermuda" (*a*), an attempt was made to attach prize money in the hands of a prize agent, under the provisions of the Nova Scotia statute, 1 Geo. III. c. 8; but it was held by Dr. Croke that this could not be permitted; that the Nova Scotia statute was in this particular "repugnant" to the Imperial "Prize Act," 49 Geo. III. c. 123, and therefore, to that extent, void. He, however, notices the contention we have referred to, in favor of the validity of the Provincial Act, and thus disposes of it:

"Considering it in another point of view, and giving it every possible validity, still the British Act must be allowed to be of equal authority, and then the provincial Act must be taken to be substantially repealed, so far as it is repugnant to the British Act, which is of a later date."

We may also refer to "The Providence," in which the provisions of the English Navigation Act (12 Car. II. c. 18)—the second section of which was directed against alien traders—was enforced in Nova Scotia against an American trader, in 1820 (*b*). That section, being of express colonial application, and not repealed by any subsequent Imperial Act, was held by Dr. Croke to be still in force in Nova Scotia, "though not often acted upon."

(*a*) Stewart, 245.

(*b*) Stewart, 186.

And in like manner the English Bankruptcy Act (12 & 13 Vic. c. 106) was held to apply to Nova Scotia—so far as to discharge the bankrupt from debts there incurred—and an attachment of debts due to him, issued after the *fiat*, was set aside (c).

When an Imperial Act, made applicable by express words or necessary intendment to any colony, is (even after the establishment of a legislature in such colony) repealed by an Imperial Act, such repeal is operative in the colony. This was one of the points for decision in the old case of *Bank of Upper Canada v. Bethune (d)*, in which it was endeavored to subject the Bank to the disabilities imposed by the English Bubble Acts. The earlier one of these Acts had been repealed by an Act of the Imperial parliament, 6 Geo. IV. c. 91, and in pronouncing the judgment of the court, that by reason of such repeal the Bubble Acts were no longer in force in Upper Canada, Robinson, C.J., brings out clearly :

1st. That the Quebec Act, 1774, and the Provincial Act, 40 Geo. III. c. 1 (upon which two Acts our enjoyment of the criminal law (e) of England rests), were not intended to refer to Acts expressly, or by necessary intendment, made applicable to the colonies in general, or to Canada in particular.

2nd. That such Acts continued to be, as they had always been, in force here by their own inherent vigor alone; and

3rd. That a repeal by Imperial Act would wipe them out of the list of colonial laws. It goes without saying

(c) Hall v. Goodall, 3 Murd. Epit. 149; Fraser v. Morrow, 2 Thomp. 232, and see also "The Friends Adventure," Stewart, 200; "The Fama," Stewart, 112; and Congdon's N. S. Dig. 1336, *et seq.*, and Steven's Dig. N. B. *sub. tit.*, "British Statutes."

(d) 4 U. C. Q. B. (O. S.) 165.

(e) The argument is equally applicable in reference to the Act 32 Geo. III. c. 1 (U. C.), introducing English *civil* law.

that his views are very clearly expressed, and we venture therefore to quote somewhat at length from his opinion :

“ My opinion is, that the first Bubble Act has not been in force in this province since the repeal of that statute by the Imperial parliament in their Act of 6 Geo. IV. c. 91. While it was in force, I think it derived its obligations in the colonies, first and principally, from the very words of the statute itself. It was passed in order that its provisions might extend, not merely to London and other parts of the Kingdom, but also to Ireland and ‘other his Majesty’s dominions.’ It was in force in the colonies by the same act of legislative authority, and its obligation rested on the same foundation in the colonies as in England. . . . When, therefore, the legislature determined it to be expedient that the first Bubble Act, or rather those clauses of it which are now in question, should be repealed, and that the several undertakings, attempts, etc., therein prohibited should be left to be dealt with according to the common law, they did, in my opinion, absolve the application of that statute as plainly and as fully in the colonies as in other parts of the Empire where it had been in force. Of course, that must be the effect, unless some statute passed in England or in this colony since the first Bubble Act prevents it. The second Bubble Act, 14 Geo. II. c. 37, cannot, as I think, have that effect. It was never anything but a mere supplement to the first Bubble Act. *Omne accessorium sequitur suum principale*. The latter statute has nothing to stand upon if the former has been withdrawn. Then we must next consider the effect of “The Quebec Act, 1774,” introducing the criminal law of England into the province of Quebec, and of our provincial statute, 40 Geo. III. c. 1, declaring that the criminal law of England, as it stood on 17th September, 1792, shall be the criminal law of this province. Neither of those enactments, in my opinion, were intended to affect, or can properly be construed to affect, the question whether the Bubble Acts are now in force in this province.

“ By the Quebec Act, 1774, the British parliament clearly designed to give to Canada the criminal law of England, as to those objects and in those matters for which no special provision

had before been made by parliament. That statute had no intended reference to Acts of parliament which, from their very terms, already were as much in force in the colonies as in England, and which consequently required no introduction at that period. It left those special laws as they stood. Upon any other principle, if there had been particular penal statutes then in force applying solely and exclusively to the colonies, and forming no part of the law of England, we must have held such statutes to be virtually repealed by the Quebec Act, 1774, giving us the criminal law of England, though clearly such an effect never could have been intended. The Bubble Acts were not peculiarly the law of England—they did not come to us as introduced by The Quebec Act, 1774; they were part of the criminal law of England, and of the other colonies before, and they continued to be so upon the same ground, and no other, after the Quebec Act was passed, as before.

“Then, as to our statute 40 Geo. III. c. 1, the point is still more clear. Our colonial legislature, when they passed that Act, must be taken to have been using their discretion and choice in introducing the criminal law of England, in the whole or in part, with or without exception, as they judged best. Now, they had, at that time, no discretion to exercise in regard to these Bubble Acts, because they already formed part of our penal law, being expressly made to extend to this and other colonies by a power beyond that of the provincial legislature. If they had desired to except them they could not have done it, and, therefore, it cannot follow that because they did not except them, they adopted them; they were not legislating with any view to laws already in force under a power superior to their own. If they had excluded them, the exclusion would have been illegal; if they had introduced them, their declaration to that effect would have been idle and nugatory. I understand the provincial legislature to have left them as they found them, standing upon their own original foundation, which they had no power to strengthen or weaken; and when the parliament of the Mother Country repealed the original and principal Bubble Act, declaring that it was expedient to leave such practices and schemes to be dealt with according to the common law, they did, in my opinion, undo all that they had done by that statute, and they neither meant



to leave it in force, nor did leave it in force, in any one part of the British dominions more than in any other."

The principle we are now discussing, namely, the operative force in a colony of an Imperial Act repealing a previous Imperial Act of express application to such colony, was recognized in a comparatively recent case which came before the Judicial Committee of the Privy Council, *Reg. v. Mount & Morris* (*f*). These men were tried before the Supreme Criminal Court of the colony of Victoria, upon the charge of murder, alleged to have been committed on board a British ship on the high seas, and were convicted of manslaughter. The jurisdiction to try persons charged with offences committed on the sea, within the jurisdiction of the admiralty, was for the first time conferred upon colonial courts, in 1849, by the Imperial Act 12 & 13 Vic. c. 96, the second section of which provided that convicted persons should be subject to the same punishment "as by any law now in force" persons convicted of the same offence would be liable to, had the offence been committed and the trial had in England.

At the time this Act was passed, the punishment for manslaughter in England was transportation for life. Afterwards, by an Imperial Act, punishment by transportation was abolished, penal servitude being substituted therefor. There was nothing in this Act expressly extending it to the colonies; but, notwithstanding this, the Committee held that the previous Act, 12 & 13 Vic. c. 96, which had conferred on colonial criminal courts the jurisdiction to try such offences as we have mentioned, must be held to be amended (in respect to the sentence to be imposed) by the Act which abolished transportation. Their view is thus expressed:

"When the Imperial legislature substituted penal servitude for transportation, it is reasonable to suppose that the alteration

(*f*) L. R. 6 P. C. 233.

was intended to embrace sentences for offences tried in the colonies under the special jurisdiction conferred by 12 & 13 Vic., since there is no trace of any intention on the part of the legislature to change the policy of that Act, which orders these sentences to be passed according to the law of England.

“This construction creates no conflict between Imperial and colonial authority, and in no way affects the rights and privileges of the colonial legislatures. It simply affirms that the Imperial statute, which gave the courts of the colonies *quoad* offences committed upon the seas beyond their territorial limits, a jurisdiction which their own legislatures could not confer, was altered by a subsequent Imperial Act.”

This case, as will be seen, is a pretty strong one, as the alteration of the previous Act (which alteration was held to have effect in the colonies) was an alteration by implication, and not by direct amendment or repeal.

It is beyond the scope of this work to enumerate even briefly the various Imperial Acts (*g*) which to-day lay down, on various matters, the law for our guidance and submission. The most that can be done is to indicate, with no pretence of exhaustive treatment, some of the subjects

(*g*) For other cases involving an enquiry whether or not some particular Imperial Act extends to Canada, see:—

Routledge v. Low, L. R. 3 E. and I. App. 100—Copyright Act (5 & 6 Vic. c. 45).

*In re Lyons*, 6 U. C. Q. B. (O. S.) 627—An Act respecting Declarations in lieu of Oaths.

*Hodgins v. McNeil*, 9 Grant, 305—Lord Lyndhurst's Marriage Act (5 & 6 Wm. IV. c. 54). “The colonies are not mentioned in the Act, nor included by any necessary or even strong intendment.”

*Thompson v. Bennett*, 22 U. C. C. P. 393—Orders in Lunacy (11 Geo. IV. and 1 Wm. IV. c. 60).

*Re Squier*, 46 U. C. Q. B. 474—Removal of Colonial Officers, (22 Geo. III. c. 75).

*Georgian Bay Trans. Co. v. Fisher*, 5 O. A. R. 383—Merchant Shipping Acts.

*Mowat v. McPhee*, 5 S. C. R. 66.

*Allen v. Hanson*, 18 S. C. R. 667, at p. 681—English Joint Stock Companies Acts.

on which the Imperial parliament does legislate for us. We have adverted, to some extent, to the general nature of such subjects in a previous chapter, and have indicated that they are subjects which are deemed to be of common concern to the whole Empire, but it will be advisable to defer any further remarks upon this branch until we come to treat of those sections of the B. N. A. Act which divide the field of colonial self-government allotted to Canada between the parliament of Canada on the one hand, and the Legislative Assemblies of the various provinces, on the other (*h*). ✕

(*h*) The "Chronological Index," published with the English Law Reports, affords a convenient method of tracing the fate of Imperial Acts. See *sub. tit.* "Colonies" and the various cross-references.

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final

## CHAPTER V. <sup>-54pp.</sup>

### THE SOURCES OF OUR LAW.

In the last chapter, we pointed out the necessity for a careful distinction between Imperial Acts which are in force in any particular colony because "made applicable to such colony by the express words or necessary intentment" thereof (*a*) and Acts which (as coming within the term English law, or the law of England) have been, by Imperial grant or colonial adoption, made the law of the colony. A constant guard must be maintained with reference to this distinction. In the last chapter, the extent to which we are subject to the law enacted in and by the former class of Imperial Acts was discussed. This chapter will deal with those Imperial Acts, and those only, which have no expressed reference to the colonies in general, or to any colony in particular, and the enquiry is to be—To what extent are *such* Acts to be held in force in Canada?

In entering upon this enquiry, it becomes at once apparent that there is a marked variety in the position of the various provinces of which the Dominion of Canada is composed; and that the extent to which English statutory law, of a general character, is in force in the different provinces, is by no means the same. The reasons for this variety are to be sought in the differences which mark their

(a) 23 & 24 Vic. c. 63, s. 1 (Imp.).



early history as separate colonies of Great Britain—differences as to the mode by which they attained that distinction—differences in the methods employed by Imperial authority, in determining what system of jurisprudence should be given to such of them as had that question settled for them by Imperial authority—differences in the extent to which English law was adopted by such of them as determined the question for themselves—differences as to the point of time in reference to which the introduction took place.

“A question of this kind,” said Chief Justice Robinson, in 1845, “arising in any British colony, must depend upon the manner in which the law of England has become the law of that particular colony; whether it has been merely assumed to be in force upon common law principles, as in the case of new and uninhabited lands found and planted by British subjects; or whether it has been introduced by some positive-enactment of the Mother Country, or of the colony, or (as may be done in the case of a conquered country) imposed by the mere act or regulation of the King, in the exercise of his royal prerogative” (b).

It may be said that in Canada there are, among the provinces, representatives of each of the classes of colonies referred to by the eminent Chief Justice whose words we have quoted; and an apology, therefore, is hardly in order for making our inquiry, so to speak, *by provinces*.

The reader should, perhaps, be warned that many of the English statutes, upon which discussions have taken place and decisions been given to the effect that they must be held to be in force here, are not, at this date, in force in Canada, and for the reason that the subject with which they deal has, since they were under judicial scrutiny, received attention at the hands of our parliaments. It cannot be too carefully kept in mind that it is only in the absence of Canadian or provincial legislation

(b) See *post*, Chap. VI.

(as the case may be) on the subject, that any question can arise as to the effect here of an Imperial enactment, passed before the date in reference to which, English law is to be taken as a fixed "body" of law, and as such introduced into the different provinces. The cases are collected and reviewed in order to enable the reader to fully grasp, if possible, the principles on which the decision must rest, which admits or denies any Imperial statute as operative here, rather than as showing what particular Imperial enactments are to-day in force in the different provinces of Canada.

*Seniores priores.*—NOVA SCOTIA, as the oldest of the provinces, is entitled to the first consideration. We have already referred to the claim made by the General Assembly of that province in 1759, that Nova Scotia "did always of right belong to the Crown of England, both by priority of discovery and ancient possession" (c). By the Nova Scotia courts, this claim would appear to have been recognized; to this extent, at all events, that Nova Scotia has always been treated as a colony by settlement as distinguished from a colony obtained by conquest or cession. Owing to the absence of reports of the early decisions in that province, we are unable, by direct reference to decided cases, to show the way in which this question—how far English law was deemed to be introduced—was treated in the earlier years of its history. There is, however, one decision in that province which may be considered classic upon this question, and subsequent decisions have practically been but the application of the principles enunciated in that case. The decision to which we refer is that of the Supreme Court of Nova Scotia, in the case of Uniacke v. Dickson (d). Chief Justice Halliburton, who then presided over the court, had, at the time this decision was given (19th February, 1848), occupied a seat on the bench for over forty years. Both on account of the exhaustive treatment of the whole ques-

(c) *ante*, p. 26.

(d) James, 287.

tion contained in the opinions of the Chief Justice and Mr. Justice Hill, and because the case is a fitting introduction to our whole subject, we venture to quote somewhat fully from those opinions.

The action was an action on a mortgage, in which the Attorney-General for the province intervened, claiming a charge in priority to that of the plaintiff, by reason of certain debts which were due to the Crown by the mortgagor. The claim was based upon Imperial statutes, 33 Hen. VIII. c. 39, and 13 Eliz. c. 4, the general tenor of which, is sufficiently indicated in the judgments:

HALLIBURTON, C.J.—

“ . . . . . To what extent the laws of the mother country prevail in the colonies settled by her descendants, is a question which has occasioned much discussion without producing any rule approaching to precision for our guidance.

“ The language of elementary writers upon this subject is couched in such general terms and qualified by such numerous exceptions, that they perplex rather than enlighten us.

“ Our excellent Blackstone, for instance, says, in his commentaries (1st vol. 101), ‘it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being (which are the birth-right of every subject) are immediately there in force.’ Had the learned commentator stopped here, he would indeed have laid down a rule so broad as to embrace every case and remove all difficulty; no distinction is alluded to between the common and statute law, but all the laws then in force in England are to be at once transplanted into the infant colony. His own good sense, however, at once pointed out to him the absurdity of such a position, and he immediately adds: ‘But this must be understood with very many and very great restrictions; they carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony’; and among his exceptions, he particularly mentions the laws of police and revenue.

“ Among the colonists themselves there has generally existed a strong disposition to draw a distinction between the common

and the statute law. As a code, they have been disposed to adopt the whole of the former, with the exception of such parts only as were obviously inconsistent with their new situations, whilst, far from being inclined to adopt the whole body of the statute law, they thought that such parts of them only were in force among them as were obviously applicable to, and necessary for, them.

“As it respects the common law, any exclusion formed the exception; whereas, in the statute law, the reception formed the exception.

“Now, although this view of the subject leads us to nothing very precise, yet, if we adopt it, and I think it wise and safe to do so, we must hold it to be quite clear that an English statute is applicable and necessary for us before we decide that it is in force here.

“The language of C.J. Chipman, in the case of the King v. McLaughlin (*e*), might induce us to suppose that he did not recognize this distinction, for he says: ‘As to the distinction attempted to be drawn by the counsel for the claimants, between the common law and the statute law extending to the colonies, other statutes than those mentioned by the Solicitor-General are daily acted upon’; but when I turn to the expression of this able judge at the commencement of his opinion, I think he sanctions the distinction. He there says: ‘Each colony, at its settlement, takes with it the common law and all the statute law applicable to its colonial condition.’ Indeed, the distinction exists in the very nature of things, and is derived from the origin of the two codes. The common law has its foundation in those general and immutable principles of justice which regulate the intercourse of men with men, wherever they may reside. The statute law emanates from the wisdom of the legislature of the day, varies with varying circumstances, and consists of enactments which may be beneficial at one time and

(*e*) There does not seem to be any printed report of this case, beyond a note of it in Stevens’ Dig. (N. B.). It involved the same Imperial Act as was in question in *Uniacke v. Dickson*; but, in New Brunswick, the Act was held to be in force. As will be noticed hereafter, the courts of that province have been more liberal in their recognition of the binding force in the province of British Acts; see *post*.



injurious at another—which might advance the interests of one community, and prove ruinous to those who were differently situated.

“My venerable predecessor, C.J. Blowers, who presided so ably in the Supreme Court for many years, inclined to the opinion, that those statutes only which were in amelioration of the common law, and increased the liberty of the subject, were in force here; and though (as we have no reports of the decisions) my memory does not enable me to mention any particular case which he decided upon that principle, I well recollect that he was invariably influenced by it in all cases to which it was applicable,

“It has been contended that the 33rd of Henry VIII. is in amendment of the common law, and I observe that Mr. Justice Botsford, in the case I have alluded to (*Rex. v. McLaughlin*), gave a reluctant assent to the adoption of it in New Brunswick upon that ground. The 74th section, to which he particularly alluded, may, perhaps, be deemed to have that tendency, although conflicting decisions have been given in cases arising upon it, in Westminster Hall; but surely, taking the statute as a whole, it never can be considered in that light. But without excluding either statute upon that ground alone, let us inquire upon what ground they are now, for the first time, to be adopted, when we have had a local legislature for nearly a century, fully empowered to make such laws as the interests of the colony has required. . . .

“In continuing his observations upon the extension of the laws of England to the colonies of the Empire, Blackstone says, in the same page from which I have already quoted, ‘What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided, in the first instance, by their own provincial judicature, subject to the revision and control of the King in Council.’ It is not contended that either of these statutes has ever received this sanction in Nova Scotia. The attempt to enforce them here is now, for the first time, made; and it appears to me to be incumbent upon those who preside in the respective courts of judicature in this province gravely to consider whether the adoption of their

provisions, if it be judicious to adopt them, is not now rather the province of the legislature than the courts.

“In the early settlement of a colony, when the local legislature has just been called into existence, and has its attention engrossed by the immediate wants of the infant community in their new situation, the courts of judicature would naturally look for guidance, in deciding upon the claims of litigants, to the general laws of the mother country, and would exercise greater latitude in the adoption of them than they would be entitled to do as their local legislature, in the gradual development of its powers, assumed its proper position. *Every year should render the courts more cautious in the adoption of laws that had never been previously introduced into the colony*, for prudent judges would remember that it is the province of the courts to declare what is the law, and of the legislature to decide what it shall be.

“Impressed with this view of the distinct functions of the legislature and the courts at this period of our colonial existence, it does appear to me that if additional fiscal regulations are necessary to assure the due collection and payment of our provincial revenue, it would be more proper to apply to the legislature to adopt such as they may deem prudent, than to require from the courts the adoption of English statutes which were passed centuries ago, under sovereigns who were sufficiently careful of the preservation of their power, and by parliaments who, to say the least, paid as much attention to the prerogatives of the Crown as they did to the privileges of the people—statutes, the rigours of which have been diminished in the mother country during the reign of our present gracious Queen, (5 Victoria, c. 11).

“Should this course be pursued, our legislature can introduce similar ameliorations of these statutes, if they think it right to adopt them. The courts have no such power; but, if they adopt them at all, must adopt them in all their rigour.

“The 33rd of Henry VIII., if enforced here as it now stands in the English statute book, would, to a great extent, be destructive of that security to purchasers of real estate which our registry Acts were passed to ensure.

“The 13th of Elizabeth would partially have that effect also, but not so mischievously, because the officers liable to its provisions would be generally known. But bonds to the Crown, in security for the payment of duties, are given all over the province by persons engaged in the trade and others, and no one could be sure that he was safe in purchasing real estate if that statute should be now adopted.

“There is another objection to the adoption of these statutes which I think has some weight. The Supreme Court has generally considered that when the local legislature has legislated upon any particular subject, relative to which English statutes had previously existed, the colonial courts are to be guided by the provincial and not the English statutes in deciding questions upon such subjects. Thus, upon a claim of a mother to succeed to the personal estate of her deceased child, to the exclusion of her other children, the Supreme Court of this province decided that she was entitled to do so, because our legislature had re-enacted the provisions of the statutes of Charles II. upon that subject, but had not at that time (although they have since) re-enacted those of 1 James II., which latter statute had passed before we had a local legislature.

“Now, our legislature have had the subject of the securities necessary to be given for the safe collection of the revenue, under their consideration, and have passed laws upon that subject, which direct that the officers appointed to collect it shall give bonds, in which they shall be joined by sureties, for the faithful discharge of their duties; and that those who import goods liable to pay duties to the Crown, under the Acts of this province, shall not only give bonds for the payment of those duties as they become due, but shall also give warrants of attorney to confess judgment upon those bonds; a measure that would have been unnecessary if the statute of Henry VIII. was in force here, for that statute would have made the bonds themselves debts of record. If these sureties are not sufficient, the legislature, and not the courts, should be applied to, to remedy the evil.

“For these reasons I am of the opinion that these statutes, on which the Attorney-General has founded the right of the Crown



to interpose in this case are not in force here, and consequently that right cannot be sustained by them. . . . .”

HILL, J.—

“ . . . . Then, upon the best consideration I have been able to give to the question, I am of opinion that neither the statute 33 Hen. VIII. c. 39, nor that of 13 Elizabeth, c. 4, extend to, or are operative in, this province. There is confessedly no precise rule, nor can we expect to find any direct decision, as to what Imperial statutes extend to the colonies discovered, settled, and peopled by British subjects. *The question seems to be, and indeed must of necessity be, left open to be decided in each particular colony and case by the courts established in those colonies.* A law that would be very fit, advantageous, and applicable to one colony, might be very inapplicable to, and unfit for another—one very requisite in one colony, might not be at all required in another; nay, might be very unfit for it, and injudicious to be adopted.

“ The general rule on this subject appears to be, that wherever English subjects discover and possess themselves of an uninhabited country, they carry with them such of the English laws then in force as are applicable and necessary to their situation and the condition of the infant colony; as, for instance, laws for the protection of their persons and property. Wherever an Englishman goes, he carries with him as much of the English law and liberty as the nature of his situation will allow. Lord Mansfield, in the case of *Lindo v. Lord Rodney*, reported in note (l) to the case of *Le Caux v. Eden*, Doug. 594, says: ‘The colonies take all the common and statute law of England applicable to their situation and condition.’ Blackstone, in his *Commentaries*, Vol. I. 106 thus lays it down: ‘Besides these adjacent islands (the islands of Jersey, Guernsey, and others) our more distant plantations in America and elsewhere are also, in some respects, subject to the English law. Plantations or colonies in distant countries are either such where the lands are claimed by right of occupancy only, finding them desert and uncultivated, and peopling them for the mother country; or, when already cultivated, they have either been gained by conquest, or ceded to us by treaties; and both these rights are founded upon the law of nature, or at least, upon that of nations. But there is a difference between these two species



of colonies with respect to the laws by which they are bound; for it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. But this' (that is the doctrine laid down in Salk. 411 and 666, whom Blackstone quotes) 'must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great commercial people, the laws of police and revenue (such especially as are enforced by penalties) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and, therefore, are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided, in the first instance, by their own provincial judicature, subject to the revision and control of the King in Council.'

"Blackstone, therefore, dissents from the unrestricted position in *Blankard v. Galdy*, Salk. 411.

"Chitty, on *Prerogatives of the Crown*, p. 30, appears to adopt the doctrine as modified and restricted by Blackstone. He says, 'If an uninhabited country be discovered and peopled by English subjects, they are supposed to possess themselves of it for their sovereign, and such of the English laws then in force as are applicable and necessary to their situation and the condition of an infant colony—as, for instance, laws for the protection of their persons and property—are immediately in force. Wherever an Englishman goes, he carries with him as much of English law and liberty as the nature of his situation will allow.'

"Chitty refers to an anonymous case, in 2 P. Will. 75, and to the *Queen v. Mayor and Aldermen of Norwich*, 2 Ld. Raymond, 1245, in which last case Lord Holt refers to *Blankard v. Galdy*.

"Clarke's *Colonial Law*, p. 7, is merely a repetition of what Blackstone has already said on this subject, and from whom I have quoted.

“The whole tenor and spirit of what all the writers on this subject have said, and of all the cases relating to it, in my mind, leave the question under consideration widely open, and that *whether a particular statute does or does not extend to a colony is to be decided in each particular case by the colonial judicature*, subject to an appeal home. . .

“When this colony was first settled and possessed by English subjects, were these two statutes applicable and necessary to the condition and state of the first occupiers and possessors? Did the state of the colony require them to be in force? I do not conceive the question to be whether the whole or some small part of these Acts might not, as it were, be pressed into the service, but whether they are necessary to our wants and requirements? Looking then at the matter in this point of view, I cannot say that these statutes were, or are, necessary to the state and condition of Nova Scotia—to its wants and requirements. In that great country where these statutes were passed, the rights of the Crown were considered sufficiently protected under the common law until the time of their enactment; and in an infant colony like this, at its first settlement, and even now, the rights of the Crown will find ample and adequate protection under that same law, without requiring the aid of these stringent statutes. There is no danger, I think, of its being prejudiced in the collections of its revenue, or otherwise.


“Up to this period I have never heard of any complaint or difficulties upon the subject. In England, where the Crown revenues were so great, and derivable from so many resources, and where its dues necessarily pass through so many hands, it might be very proper to clothe the Crown with greater authority and security to collect its revenues. But how could that be necessary here, on the first settlement of the country, when the Crown may be literally said to have had no revenue from any source, nor any debts due to it? But how has the colonial legislature silently spoken upon this subject? If it had been thought that these statutes were wholesome, necessary, and applicable to us, I cannot but think that our legislature would have so said by re-enacting them. The legislature, in its very first session in 1758, did re-enact many provisions of English statutes which were thought applicable to our situation, and

from time to time such re-enactments have found their way into our statute books, but we find nothing of these statutes being re-enacted. Does not then this fact show in strong colors what the opinion of our legislature was and has been on the matter? for, as I have remarked, if occasion had called for it, there undoubtedly would have been a re-enactment. As far, therefore, as the opinion of the legislature may be gathered, these statutes do not extend to us; and I must add, that, on a reference to our statute book, it will be found that very particular attention has been paid to the securing the debts of the Crown under our various revenue Acts, and particularly under those of a later date. The mode of securing and the manner of collecting are precisely pointed out, so that it is manifest the subject of the Crown debts has been under the consideration of our own legislature. I allude to this, not as showing that our legislature would abrogate the statutes of Henry and Elizabeth, but as an argument that they did not extend to us.

“Thus far, then, as to the legislature. What, then, has been the opinion and practice among the profession? Cases must have arisen in which these statutes, if extending here, might, and probably would, be called into operation; and yet this is the first occasion on which the attention of any court in the province has been called to them. The contrary has not been asserted; and, no doubt, the fact is, that the writ of extent never issued in this country. The ordinary process of our courts has invariably been the mode of collecting the Crown debts. Why, then, has this been so? I apprehend merely because no inconvenience has ever been found to flow from following the ordinary and prevailing practice—no detriment to the rights or interests of the Crown. This non-user, if I may so speak, of either of these statutes, this want of any reference to them, convinces me that the profession, at all events, never considered them as having any efficacy with us.

“Now, the interest in this case is entirely local, it alone concerns the province and the support of its government; no portion of this money goes into the private coffers of the sovereign, or into the Imperial treasury; and when circumstances shall demand it, doubtless we shall pass our statutes of Henry and Elizabeth, as was done in England.

But let us suppose that our legislature in 1758 had re-enacted these two statutes, or that portion of them which relates to the matter in hand; could it be said that they were necessary, or rather, could it be denied that their enactment would have been absurd, inasmuch as there was nothing for them to operate on.

“The question, therefore, after all, is a narrow one, and may be said to be more addressed to our judgment, *as prudent and right-judging men*, than as lawyers and judges. My opinion, therefore, is based upon this consideration, that neither of these statutes was applicable and necessary to our state and condition when the province was first settled, nor at any time since, and that the rights of the Crown are amply protected and secured by the common law.” 

Acts in curtailment of prerogative seem to have been favorably looked on by Nova Scotia judges. Magna Charta and the second and third charters of Henry III. were held (*f*) to be operative within the province, to prevent the Crown from granting a general right of fishery; for, as was said, a grant to support that must be as old as the reign of Henry II., and, therefore, beyond legal memory; for, by Magna Charta and the charters of Henry III., the king is expressly precluded from making fresh grants. Again, it was held (*g*) that where land had been granted, with a condition that the grant should be void if the land were not settled upon within a certain time, no new grant could be made without inquest taken; the provisions of the statutes 8 Henry VIII. c. 16, and 18 Henry VIII. c. 6, being held operative within the province, to prevent such new grant from taking effect. The view acted upon by the court is thus expressed:

“The very grievances intended to be remedied and redressed by this statute, are those under which the subjects of this province might well say they labored, if it were held that land,

(*f*) Meisner v. Fanning, 2 Thomp. 97.

(*g*) Wheelock v. McKeown, 1 Thomp. 41 (2nd ed.); and see also Miller v. Lanty, *ib.*, 161.



granted with a condition that the grant should be void if the land were not settled on within a certain time, could be subsequently granted without inquest of office."

The same view was thus expressed in a later case (*h*) involving consideration of the same statute :

"The court has uniformly decided that when there is *plena possessio* held against the Crown—particularly under color of title—the Crown must re-invest itself with the possession before it can grant ; and, if it grant while it is out of possession, that grant is void under 8 Henry VIII. c. 16, and 18 Henry VIII. c. 6."

In a still later case (*i*), involving consideration of 21 Jac. I. c. 14—an Act *in pari materia* with the statutes of Henry, above referred to—Young, C.J., speaking of *Uniacke v. Dickson* and the statute there in question, says :

"The statute of James is of a different character. The object of the former was to extend, that of the latter is to limit and restrain, the prerogative of the Crown, and that for a highly beneficial purpose, and for the protection and benefit of the subject. What class of persons is better entitled to the favor of the legislature and the courts than the men who transform a rude country into smiling habitations, and fit it for the use and enjoyment of man? I look upon this statute of James as peculiarly suited to our condition and circumstances, and to have the same title to be considered part of our law, and on the same principle on which we have always recognized the Statute of Uses and the statute *de Donis* until the present enactment abolishing estates-tail."

The view expressed by Halliburton, C.J., in *Uniacke v. Dickson*, that after a legislature has been duly constituted in a colony, and has, so to speak, settled down to its work, courts of law should be very cautious in giving effect to Imperial Acts which had never been previously acted upon

(*h*) *Scott v. Henderson*, 2 Thomp. 115.

(*i*) *Smyth v. McDonald*, 1 Old. 274.

in the colony (*j*), has evidently had a most powerful effect in subsequent cases. For instance, the court refused to visit upon the sheriff of Halifax penalties to which he would have been liable under English statutes, because the Nova Scotia legislature "have wisely legislated for the whole matter. . . . The imperative words of the English statute throw the responsibility upon the sheriff in England, but these words are not to be found in our statute, and therefore neither law nor justice throw it upon him here" (*k*).

And, in like manner, the Imperial statutes 28 Edw. III. c. 13, and 8 Hen. VI. c. 29, giving aliens a right to a jury *de medietate lingue*, and the other statutes with that object, were held (*l*) not to be in force in Nova Scotia, because :

"In the numerous Jury Acts, extending from 1759 . . . down to the Revised Statutes (2nd ser.), not the slightest allusion nor provision for this privilege of aliens : . . is to be found. This long course of legislation, coupled with the fact that it has never before been claimed in our courts, though the idea, and the usage in the mother country, were familiar to every lawyer, is strong evidence of the opinions held by our judges and legislators."

In a late case (*m*), the Supreme Court of Nova Scotia had to consider the question whether or not the imperial statute 13 Geo. II. c. 18, requiring notice to a convicting justice, of a motion for a writ of *certiorari*, and limiting the time for moving for such writ, to six months from conviction, was in force in the province. Reference was made by

(*j*) See the passage, *ante* p. 81.

(*k*) *Jackson v. Campbell*, 1 Thomp. 18 (2nd ed.).

(*l*) *Reg. v. Burdell*, 1 Old. 126.

(*m*) *Reg. v. Porter*, 20 N. S. R. Reference is made to the fact that in Upper Canada it had been always treated as in force there. It appears to have been acted on in Nova Scotia. See *Reg. v. McFadden*, 6 R. & G. 426, and *McDonald v. Ronan*, 7 R. & G. 25. As to New Brunswick, see *post*, p. 94.

Ritchie, J., in delivering the judgment of the court, to *Uniacke v. Dickson*. After quoting the caution of Halliburton, C.J., above referred to, the opinion proceeds:

"If this caution was necessary forty years ago, there is much more necessity for caution now, in view of the fact that, since then, very many Acts have been passed, regulating the practice and procedure of this court, and the removal of causes from inferior courts. . . . Now, our legislature has passed several statutes on the subject. . . . I cannot see that 13 Geo. II. c. 18, is obviously applicable and necessary to our condition in this province; and as our legislature has undertaken to legislate in the matter of *certiorari*, and has enacted many of the provisions of the English statutes on that subject, omitting those contained in the Act in question, I have been unable to come to the conclusion that that Act is at present in force here."

A number of Imperial Acts, passed prior to the settlement of Nova Scotia, have been acted upon without question, as having been introduced into the colony upon its settlement. The Statute of Uses was, without question, treated as being in force within the province (*n*), while its companion—the Statute of Enrolment—would appear to have been thought inapplicable, by reason of the lack of facilities for enrolment (*o*). The Imperial Acts, 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, allowing partition between joint tenants and tenants in common, were held to have been introduced into Nova Scotia as part of the English law; and the Nova Scotia legislature, in passing R. S. N. S. c. 139, s. 1, was held to have intended to make the remedy thereby provided, concurrent with the remedy under those statutes of Henry VIII. (*p*). In the case of "*The Dart*" (*q*), the provisions of Magna Charta, and of the Statute of Staples, 27 Edward III. c. 17, which provided that, "In case of war, merchant strangers

(*n*) *Shey v. Chisholm*, James, 52.

(*o*) *Berry v. Berry*, 4 R. & G. 66; see the contrary holding in *New Brunswick, Doe d. Hanington v. McFadden*, Berton, 153, *post*, p. 92.

(*p*) *Doane v. McKenny*, James, 328.

(*q*) *Stewart*.

shall have free liberty to depart the realm with their goods freely," were enforced in favor of an American vessel, seized before the commencement of the American war of 1812. The Act 13 Eliz. c. 5, respecting fraudulent conveyances, seems to have been acted upon without question (*r*), as also the Act 32 Henry VIII. c. 9, against the buying of pretended titles (*s*).

Upon a review of these Nova Scotia decisions, it would certainly appear that the admission of Imperial statutes, as operative within the province, has been the exception; those which have been held to be in force, being, in the main, statutes in amelioration of the rigors of the common law, Acts in curtailment of prerogative or in enlargement of the liberty of the subject. To a greater extent than has been the case in either New Brunswick or Ontario, the judges of Nova Scotia have deemed it the office of legislation, rather than of judicial decision, to bring into operation within the province, the provisions of Imperial statutes not originally capable of being made operative, but which might be thought suitable to the changed circumstances of the colony. And in the same spirit, it was laid down (*t*), that where an English Act is held to be in force, the courts "will not give it a further extension than it received in the land of its origin. The operation of an English statute may be confined, I take it, within narrower bounds by the circumstances and situation of the colony to which it has been brought; but it can never, as it appears to me, become a

(*r*) *Tarratt v. Sawyer*, 1 Thomp. 46 (2nd ed.); *Moore v. Moore*, 1 R. & G. 525; and *Graham v. Bell*, 5 R. & G. 90.

(*s*) *Wheelock v. Morrison*, 1 N. S. D. 337; *Scott v. Henderson*, 2 Thomp. 115. Other Imperial Acts which have been treated as in force in Nova Scotia, are: 13 Edw. I. c. 18 (*elegit*), *Caldwell v. Kinsman*, James, 398; 2 Hen. IV. c. 7 (*judgment of nonsuit*), *Grant v. Protection Ins. Co.*, 1 Thomp. 12 (2nd ed.); 7 Hen. VIII. c. 4 (*damages in replevin*); *Freeman v. Harrington*, 1 Old. 358; and see Congdon's N. S. Dig., col. 1336, *et seq.*

(*t*) *Freeman v. Morton*, 2 Thomp. 352, *per Bliss*, J.



statute of greater effect or more enlarged construction than was given to it in the intention of those by whom it was passed. This is the office of legislation alone."

NEW BRUNSWICK.—In this province, we have the same difficulty to contend with as was noted in the case of Nova Scotia, namely, that there are no reports of the earlier decisions in the province during the time when this question would be most frequently under consideration. The earliest reported case (*u*) in which we are furnished with the opinions of the judges, is *Doe dem Hanington v. McFadden* (*v*), in which the Supreme Court of that province had to consider whether or not the Statute of Uses and its companion—the Statute of Enrolment—were in force in the province, and that case has had a very large controlling influence in New Brunswick. Chipman, C.J., quotes with approval the language of Sir W. Grant in *Attorney-General v. Stewart* (*w*), and takes as his guide, the principle enunciated in that case—"Whether it be a law of local policy, adapted solely to the country in which it was made, or a general regulation of property, equally applicable to any country, in which it is by the rules of English law that property is governed." As to the Statute of Uses, no doubt whatever was expressed; the fact that that statute had been generally, if not universally, considered to be in force in the old American colonies, was treated as indicative of the general understanding that the statute was carried by emigrating colonists as part of the law of England relating to real property. As to the Statute of Enrolment, more hesitation seems to have been expressed; but all the judges concurred in treating the two statutes as practically one; and, although the Statute of Enrolment might be somewhat difficult of application in New Brunswick, it seems to have been considered that the machinery of the provincial courts could be utilized in this respect.

(*u*) See note, *ante*, p. 79, as to *Rex. v. McLaughlin*.

(*v*) Berton, 153.

(*w*) 2 Mer. at p. 160.

It was pointed out that the extension to the province, of statutes which are in terms confined to the courts of the mother country, is not, by any means, without precedent, and several of such statutes, regulative of the practice in "Her Majesty's Courts at Westminster," which had always been treated as operative within the province in relation to the superior courts there, were cited (*x*).

No such clear thread of principle can be discerned in the decisions of the New Brunswick courts as has been noticed in the case of Nova Scotia, and, for that reason, it is somewhat difficult to classify the decisions.

In an early case (*y*), it was held that the Imperial Act, 32 Henry VIII. c. 39, which authorized the Exchequer Court in England to give relief to Crown debtors, was operative to enable the Supreme Court of New Brunswick to relieve from an estreated recognizance.

Following Attorney-General v. Stewart, it was held (*z*) that the Statute of Mortmain, 9 Geo. II. c. 36, is not in force in New Brunswick.

In Kavanagh v. Phelon (*a*), involving a consideration of the fees proper to be paid to a sheriff, it was held that 29 Eliz. c. 4, was not operative in New Brunswick to regulate the sheriff's fees, in cases not provided for by the provincial ordinance upon the subject. Referring to *Doe dem* Hanington v. McFadden (*b*), Chipman, C.J., says:

"For the same reason it seems to me that the statute of 29 Eliz. is entirely inapplicable to this or any other colony, and, therefore, is not in force here. It is difficult to conceive of any

(*x*) 4 Anne, c. 16 (assignment of bail-bonds); 14 Geo. II. c. 17 (judgment of nonsuit); and see Kelly v. Jones, 2 Allen, 473 (43 Eliz. c. 6—certificate as to costs), and Gilbert v. Sayre, *ib.* 512 (13 Car. II. c. 2—double costs on affirmance in error). See Hesketh v. Ward, 17 U. C. C. P. 667, referred to *post*.

(*y*) Reg. v. Appleby, Berton, 397.

(*z*) *Doe d. Hasen v. Rector of St. James*, 2 P. & B. 479; see the cases in Ontario, *post*.

(*a*) 1 Kerr, 472.

(*b*) *Ante* p. 92.

subject that must be dealt with upon considerations more entirely local, than the proper remuneration to be allowed to public officers."

and he refers to the declaration in the provincial ordinance that "there is no law or ordinance now in force regulating sheriffs' fees," etc., and the regulation of the matter by that ordinance, as indicative of the view of the legislature (c).

Although, as we have said, it is very difficult to classify the New Brunswick authorities upon this question, this much does appear: that in every case the judges of the courts there have endeavored to exercise their best judgment as to the *applicability* of the Imperial statute to the circumstances of the colony. If any distinction in principle can be drawn between the decisions in New Brunswick and those in Nova Scotia, it would appear to be along the line indicated in the judgment of Halliburton, C.J., in *Uniacke v. Dickson*—that is to say, Imperial statutes have been denied operative force in Nova Scotia unless clearly applicable, while, in New Brunswick, the tendency, at least of the earlier authorities, seems to have been not to reject them unless clearly inapplicable. At the same time, it must be confessed that this distinction cannot be clearly pointed out in every case.

ONTARIO falls within the class of colonies into whose legal system, English law has been introduced by the will of the colony itself, as expressed in legislative enactment.

In the year 1791, the parliament of Great Britain passed an Act, 31 Geo. III. c. 31, commonly known in

(c) For other New Brunswick cases, see *Ex parte Ritchie*, 2 Kerr, 75, and *Ex parte Bustin*, 2 Allen, 211, in which the English statutes as to *certiorari* proceedings were held not in force; *Wilson v. Jones*, 1 Allen, 658, in which 1 Rich. II. c. 12, giving a creditor an action of debt against a sheriff on an escape, was (following an early unreported decision) held not in force, although it was acted upon in Nova Scotia and the older American colonies; and see *James v. McLean*, 3 Allen, 164, and *Doe d. Allen v. Murray*, 2 Kerr, 359.

Canada as the Constitutional Act, 1791, by which provision was made for the division of the province of Quebec into two provinces, Upper and Lower Canada, and for the establishment therein of separate governments. During the progress of the war of American independence, there had taken place, from the disaffected colonies into what afterwards became Upper Canada, a large influx of loyal subjects, "born and educated in countries where the English laws were established, and . . . unaccustomed to the laws of Canada." And as, in 1774, the parliament of Great Britain, by giving to the inhabitants of Canada, then almost exclusively French, the law in accordance with which they had been accustomed to regulate their daily lives, secured their cordial adherence to British connection, despite the enticing words of Washington and his French allies (*d*), so, in 1791, they established the new immigration in content in the upper province, by giving them a distinct legislature, with the power to adopt such system of laws as they might deem best calculated to secure and advance their own material and religious welfare. Avoiding all appearance of dictation to either province, the Constitutional Act, 1791, simply provided that there should be within each of the provinces respectively, a Legislative Council and an Assembly, and that in each of the provinces His Majesty should have power, by and with the advice and consent of the Legislative Council and Assembly of such province, to make laws for the peace, welfare, and good government thereof, such laws not being repugnant to the Act. All laws, ordinances, and statutes in force within the provinces, or either of them, at the date of the Act, were to remain and continue as if the Act had not been made, except in so far as not expressly varied by the Act—the Act is limited to the making of constitutional changes—or *except in so far as the same might be there-*

(*d*) See Confed. Deb. p. 606; Ryerson, "The U. E. Loyalists in America."



*after repealed or varied by the Legislative Council and Assemblies of the respective provinces.* The inhabitants of Lower Canada, being content with the law under which they had lived since 1774, made no change; but, in the very first parliament of Upper Canada, by the first Act of its first session, "that was done which no doubt was anticipated and intended as a consequence of erecting Upper Canada into a separate province. Reciting that the provision made by the Quebec Act, 1774 (before alluded to), had been manifestly intended for the accommodation of His Majesty's Canadian subjects, and that the territory comprising Upper Canada had become inhabited principally by British subjects, unaccustomed to the laws of Canada, it repealed the provision in the Quebec Act, 1774, so far as that Act had the effect of introducing the French law into Upper Canada, and enacted, that 'from and after the passing of this Act, in all matters of controversy *relative to property and civil rights*, resort should be had to the laws of England, as the rule for the decision of the same'" (e).

The criminal law of England had been in force in the old province, and no legislation was deemed necessary by the legislature of Upper Canada, beyond naming a day, in reference to which the English criminal law was to be considered fixed (so far as Upper Canada was concerned), unless altered by the colonial legislature. This date was fixed by 40 Geo. III. c. 1 (U. C.), which enacted: "The criminal law of England, as it stood on the 17th day of September, 1792, shall be, and the same is hereby declared to be, the criminal law of this province," subject to any variations therein, effected by ordinances of the old province of Quebec passed after the Quebec Act of 1774. The difference in the phraseology in the two Acts of 32 and 40 Geo. III. respectively, must be carefully noted, for, as will

(e) *Per Robinson, C.J., in Doe d. Anderson v. Todd*, 2 U. C. Q. B. 82; note the same expression, "*property and civil rights*," in the B. N. A. Act, s. 92, ss. 13, and s. 94; and see *Citizens v. Parsons*, L. R. 7 App. Cas. 96.

be seen hereafter, a marked difference in effect has been attributed to these two enactments. In the various revisions of the statute law, which have since taken place, these two Acts have been simply "brought up to date." They now stand as c. 93 of the Revised Statutes of Ontario (1887), and c. 144, s. 1, of the Revised Statutes of Canada (1886), respectively.

In the province of Ontario, therefore, the whole question turns upon the effect which should be given to these, our own enactments, and so far as concerns the law *relative to property and civil rights*, it will be found that, owing to the construction placed upon 32 Geo. III. c. 1, by the courts in Upper Canada, the same method of enquiry has been followed in that province (now Ontario) as in the older provinces of Nova Scotia and New Brunswick. 1792

Although the question is, with every session of our parliaments, becoming less and less of vital importance, still cases do even yet, and not infrequently arise, even in these provinces, in which the rights of suitors depend upon English statutes of considerable antiquity, making provisions as to various matters upon which our parliaments have omitted to exercise their legislative power.

Throughout the law reports of Upper Canada (Ontario), numerous cases will be found in which laws passed by the parliament of England, and in force there in 1792, were without question acted upon by our courts as being the law in Upper Canada. In the very first volume of reported cases, by Taylor, several of such instances appear (*f*), and so on through the reports to the present time. For instance, no question seems to have ever been raised as to the English Statute of Frauds, the Acts of Elizabeth's time as to fraudulent and voluntary conveyances, and a casual glance at our Digests will reveal many others, as to which no doubt has ever found a reporter. As being in affirmance of the common law, or in amendment of some defect

(*f*) Taylor, 546.

in that law, working general detriment, their position, as practically part and parcel of general English law, was too fully recognized to be questioned. But—not to mention many English Acts, whose non-applicability (if that be sound ground for rejection) is debateable—many old enactments, some regulative of medieval men by medieval methods, some but parliamentary tombstones, marking the graves of local (English) evils of a temporary character, have been invoked in Canadian litigation—put forward as having been introduced here by colonial enactment, 32 Geo. III. c. 1.

Somewhat of this sort, was the statute passed in 5 Eliz. (c. 4), making void, in the interests of the guilds, articles of apprenticeship for a less term than seven years. It was the first statute upon which argument seems to have been had, and in three early cases it received consideration. In the first (*g*) of these cases, Robinson, C.J., said: "The provisions of the statute . . . are no longer part of the law of England; they have been repealed (*h*) as impolitic, even in the condition of that populous country. In my opinion, these provisions were never part of the law of this province." In the second (*i*), Sherwood, J. (delivering the judgment of the court), says, after referring to the terms of 32 Geo. III. c. 1 (U. C.):

"The intention and meaning of the legislature undoubtedly was, that resort should be had to such of the laws of England as are applicable to the state of society in a British colony, which is very different in many respects from the state of society in England. Courts of justice are to decide on the applicability of the law to any particular case, when doubts arise on the subject; and upon the same principle, they must decide upon the adaptability of any particular law of England to this province, in a general point of view. The statute 5 Eliz. c. 4, is entitled, "An Act containing divers orders for artificers, laborers,

(*g*) *Fish v. Doyle*, Drap. 328 (1831).

(*h*) By 59 Geo. III. c. 96.

(*i*) *Dillingham v. Wilson*, 6 U. C. Q. B. (O. S.) 85 (1841).

servants of husbandry, and apprentices"; and the Act itself, from beginning to end, contains internal evidence that no resort can be properly had to it, within the scope and meaning of our Provincial Act already mentioned, as a rule for deciding the manner in which apprentices are to be bound in this province, and the legal effect of such binding. That Act was obsolete in England even before the statute which repealed it. . . . We consider the statute of 5 Eliz. c. 4, as a local Act, which was probably adapted to the state of society in England three hundred years ago, but is not now, and never was, adapted to the population of a colony, and was never in force here."

In the third case (*j*), it was broadly contended: "The court can not say, that these statutes are not in force; it is not a question of their applicability that is to be decided, the decision must be on the express words of a statute. When the law is to be given to a colony settled and planted by British subjects, we can understand that only such parts of the English statute law as are applicable shall be declared to be in force; but when the statute law is introduced by legislative enactment, there can be no question about the applicability of statutes, as the legislature have shown that their determination was to introduce them all, with the exception of those parts which are expressly excepted." In delivering the judgment of the court, Chief Justice Robinson says:

" . . . . It cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here; a clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions; but that is not sufficient to make such a statute part of our law, when the main object and tenor of it, is wholly foreign to the nature of our institutions, and it is there-

(*j*) *Shea v. Choat*, 2 U. C. Q. B. 211 (1845). The head-note is misleading. In speaking of 20 Geo. II. c. 19, Robinson, C.J., says: "My inclination at present is that that statute in its present scope and bearing is *not* applicable to this province"; but he decided that, even if in force, the pleading could not be supported, not showing a case within the statute.



fore incapable of being carried, substantially and as a whole, into execution."

- ✓ These cases distinctly affirm, that (leaving out of consideration the Poor and Bankruptcy laws) (*k*) not every English statute in force in England in 1792, even though such statute was, in a sense, of general application in England, is in force here under the terms of 32 Geo. III. c. 1—that a recognition must be accorded, so to speak, to the differences of environment, and that the courts of Upper Canada should consider the question of the adaptability of any English Act "to the nature of our institutions." To some extent, this view of the effect of 32 Geo. III. c. 1, has not met with entire approval by individual judges in subsequent cases; but, as will be seen, the decided tendency of the authorities has been to support the principle laid down in these three cases.

Baldwin v. Roddy (*l*) involved the question as to the English Act "for the removal of causes from inferior courts" (19 Geo. III. c. 70). That Act "seemed designed in England to supply a defect which parliament occasioned when they took away arrest from inferior courts in cases under £10"—the process of those courts could be evaded by the removal of a debtor's effects from the limits of their jurisdiction—and it was held by Robinson, C.J., to be introduced here. "It is a reasonable and good provision, general in its nature; not confined as to locality; not confined to certain courts, or to any amount of judgment, nor incumbered with any forms or requisitions inapplicable to the nature of our courts."

In 1836, the question arose (*m*), whether the British statute (22 Geo. II. c. 40), "for the more effectually

(*k*) Expressly excepted by 32 Geo. III. c. 1 (U. C.) s. 6.

(*l*) 3 U. C. Q. B. (O. S.) 166; and see Gregory v. Flanagan, 2 U. C. Q. B. (O. S.) 552.

(*m*) In Leith v. Willis, 5 U. C. Q. B. (O. S.) 101; followed in Heartly v. Hearn, 6 U. C. Q. B. (O. S.) 452.

restraining the retailing of distilled spirituous liquors," the 12th section of which denied all right of action to any one selling less than 20 shillings worth at one time, was to be considered in force in Upper Canada or not. The Act contained 32 clauses, as to all of which (other than the 12th section) Robinson, C.J., said: "Not one with any reason can be considered as applicable to this province"; and as to that section he said:

"Upon a view of the whole case, though I feel it difficult to rest a decision upon a perfectly clear ground, I am of opinion that the British Act does not prevent the plaintiff recovering. It was passed in England to meet a particular evil, which was stated to be increasing *there of late among a particular class of the inhabitants*. We cannot say judicially that the circumstances so far correspond in this province, as to make it a reasonable intendment that a statute passed to meet such exigency in England, is to be treated as a part of the general statute law of England, intended to be introduced into this province."

upon the further ground, too, that the Provincial Act 3 William IV. c. 1, made provisions inconsistent with the provisions of the British Act—probably the safer ground for decision upon fixed principle—the latter was held not in force here.

The English statute 9 Geo. II. c. 36—commonly classed as one of the Mortmain Acts—has been under review in a number of decided cases; and in the argument of counsel and the opinions of the judges, will be found all the considerations which can be urged in support of the two different views—those who would uphold the Act as being introduced here by the Provincial Act 32 Geo. III. c. 1, urging that because the English laws relating to the poor and to bankruptcy, were in terms excluded, the maxim "*expressio unius exclusio est alterius*" should be applied, and all other English Acts of general application in England, held to be in force in Upper Canada; while those who denied the binding force

of the statute here argued for a more limited introduction of the English law. The latter view clearly prevailed, and the various considerations urged in its support, will appear from a review of the cases. In the result, the statute was decided to be in force in Upper Canada, but only on the ground of its implied *recognition by our colonial legislature*; the view of a decided majority being, that it was not introduced by the sole force of 32 Geo. III. c. 1. In deciding in favor of the propriety of making comparison between the different situations, material and social, of the mother country and the colony, as well as in treating colonial recognition as a good ground for holding an Imperial Act in force in a colony, the courts of Upper Canada (Ontario) have practically adopted the view of Robinson, C.J., that the terms of the Act 32 Geo. III. c. 1 (U. C.), "do not place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects" (n). This is the construction to which reference was a short time ago made, as placing Ontario upon the same line in this matter as the maritime provinces, and (as we shall point out) the more lately acquired provinces of the Dominion of Canada.

The leading case, as to this statute of Mortmain, is *Doe dem Anderson v. Todd*, decided in 1845, from which we have already quoted, and which has been followed in a number of subsequent cases up to 1876, when the Court of Appeal for Ontario, upon a careful consideration of the whole subject, established the decision in the earlier case. To attempt to set forth the views of Robinson, C.J., in language other than his own, would so weaken their effect, that we feel constrained to quote his opinion somewhat at length:

(n) *Doe d. Anderson v. Todd*, 2 U. C. Q. B. at p. 86.

“The question is then left to be determined whether the devise made by that will to a charitable use is void in this country under the provisions of the statute 9 Geo. II. c. 36; that it is of such a nature as to come within the terms of that statute, cannot be doubted, and the only point, therefore, to be determined is, whether the statute is in force in Upper Canada. . . . If this had been a colony of that description, and not a conquered or ceded country, having already laws of its own, and if the question whether the statute 9 Geo. II. c. 36, could be regarded as in force or not, had turned wholly on the point whether, upon the principles of the common law, without the interposition of any legislative enactment, that statute formed part of the law binding upon all who settled in the colony or plantation, I think we should without difficulty have held that it did not, for the reasons expressed in this passage of the commentaries *(o)*, and which received the sanction of a judicial decision, in the case of *The Attorney-General v. Stuart*, 2 Mer. 144. from a very eminent judge (Sir W. Grant), and in reference to the very statute now under consideration. But it is plain that the question does not rest here on that footing, and though the case of *Attorney General v. Stuart* may appear very material to its decision, it cannot be so upon the footing that this is a colony planted originally by British subjects, to which all who have come, have brought the law of England as their birth-right, but it may be material as illustrating the extent and effect which should be given to the words of a provincial statute introducing the law of England, which statute, after all considerations are stated, must form the foundation of our decision. The country in which this question rises formed part of the conquered province of Canada, ceded by the French government, by the Treaty of Paris, 10th July, 1763. and in which, therefore, after the cession, it was in the power of the Crown, independently of the legislature *(p)*, to have introduced either the laws of England, or any other; but the laws before enjoyed by the conquered people would

*(o)* Of Blackstone, from which full extracts have already been taken; see *ante*, p. 78 *et seq.*

*(p)* See Chap. VI. *post*, for a reference to the contention to the contrary raised in Lower Canada.



prevail until such introduction. These principles are clearly and precisely stated by the Master of the Rolls (2 P. Wms. 75) to have been determined by the Lords of the Privy Council, on an appeal to the king in council from the foreign plantations. Lord C. J. Holt assents to them, in emphatic terms, in *Smith v. Cooper*, 1 Salk. 666, where he says, 'the laws of England do not extend to Virginia; being a conquered country, their law is what the king pleases.' I do not, however, understand in what sense his Lordship speaks of Virginia as a conquered country. In 1 Salk. 44, the principles we are considering are again stated by Lord C. J. Holt, and were elaborately set forth in modern times by Lord Mansfield, in the well-known case of *Campbell v. Hall*, 1 Cooper, 204. The proclamation of October, 1763, on the effect of which that judgment proceeded, was an act of the Sovereign, introducing the law of England, in general terms, into countries ceded by the Treaty of Paris; but, by some inadvertence, the territory which was then formed into the Province of Quebec, was so described in that proclamation as to exclude the greater part of Canada, in regard to which no provision was made for its civil government. This omission is noticed in the preamble to the British statute 14 Geo. III. c. 83. If the territory which lately formed Upper Canada, and in respect to which the question now before us has arisen, had been included within the limits given by that proclamation to the Province of Quebec, and if to this moment we had been left to the effect of that proclamation, which assured to the inhabitants 'the enjoyment of the benefit of the laws of England,' and directed that all causes, criminal and civil, should be determined according to law and equity, and *as near as may be, agreeable to the laws of England*, then the question would have been, whether in reason we should hold that any other laws were introduced by those general words than such laws as English colonists, planting a newly discovered country, would, on the principles of the common law, have carried with them; and, in considering that point, the observations of Sir William Grant, in *Attorney-General v. Stuart*, would have strongly applied, and might, indeed, have been taken as direct authority. Then, how does the question stand on the real facts of the case? The British statute 14 Geo. III. c. 83, noticing

the defect in the proclamation of the 7th of October, 1763, enlarged the limits there assigned to the Province of Quebec, and made them clearly embrace the country now involved in this question (if not the whole of Upper Canada); and parliament, by that Act, for the satisfaction of her Majesty's Canadian subjects, provided that within the whole of the territory thus defined, in all matters of controversy relative to *property and civil rights* (q), resort should be had to the laws of Canada (that is, the laws which prevailed in Canada before the conquest), for the decision of the same. This gave a new starting point with regard to the question, and puts an end to all doubts which might have arisen under the proclamation, which, in this respect, was wholly abrogated. The statute 31 Geo. III. c. 31, which divided the Province of Quebec, and gave to Upper Canada a distinct legislative body, and did not by anything contained in it affect the terms of this question, left the French-Canadian law in force, but it created a legislature, with power to make laws for the peace, welfare, and good government of the province, and which, under the very general terms of that authority, might alter or abrogate the existing law, if it thought proper. In the first statute passed by this legislature, 32 Geo. III. c. 1, that was done which, no doubt, was anticipated and intended as the consequence of erecting Upper Canada into a separate province. Reciting that the provision made by the 14 Geo. III. c. 83, had been 'manifestly intended for the accommodation of his Majesty's Canadian subjects,' and that the territory comprising Upper Canada had become inhabited principally by British subjects, unaccustomed to the law of Canada, it repealed the provision in the 14 Geo. III. c. 83, so far as it had the effect of introducing the French law into Upper Canada, and enacted, that 'from and after the passing of that Act, in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision for the same. And that all matters relating to testimony and legal proof in the investigation of fact, and the forms thereof, in the several courts of law and equity within this province, shall be regulated by the rules of evidence established in England'; with a proviso that the

(q) See Citizens v. Parsons, L. R. 7 App. Cas. 96.

Act 'should not be construed to interfere with the subsisting provisions respecting ecclesiastical rights or dues within the province, or with the forms of proceedings in civil actions, or the jurisdiction of the courts already established,' or to introduce 'any of the laws of England respecting the maintenance of the poor, or respecting bankrupts.' On this foundation rests our right to the enjoyment of the laws of England, except as regards the criminal law, which, having been introduced by the royal proclamation into the province of Quebec as there defined, was afterwards, by the statute 14 Geo. III. c. 83, extended to the whole territory (including Upper Canada), which was by that Act made to constitute the Province of Quebec, and has ever since been allowed to continue in force there; being expressly recognized in Upper Canada by 40 Geo. III. c. 1 (r), and modified by that and many subsequent statutes. Except for the purpose of tracing the history of the introduction of the laws which govern this colony, it was unnecessary to the decision of the point before us, to have gone further back than the statute 32 Geo. III. c. 1; whatever was done before cannot affect the question, though some things which have been done afterwards may. Then, looking in the first place at the words of this statute, it is my opinion that they do not place the introduction of the English law on a footing materially different, as regards the extent of the introduction, from what would have been; or rather from what was the effect of the proclamation of 7th October, 1763, in those territories to which it extended, or from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects. The restrictions intimated in the passage which I have cited from the commentaries and the reasons of Sir Wm. Grant, in the case of *Attorney-General v. Stuart*, apply, I think, in the case of an introduction by express enactment in such general terms, as well as in the other case. It would have been hardly possible for the legislature to have excepted, in special terms, all those British statutes which, being inapplicable to the con-

(r) See *post*, p. 123 *et seq.*



dition of the colony, they might not wish to include as parts of the law of England. And it is impossible to allow that they could have intended, by the words they used, to embrace every provision in the British statute book which they did not specially except. It is true, indeed, that they have made some special exceptions; in their enactment they have been careful to provide that we are not, under the general words used by them, to take the English poor laws and bankrupt laws with the rest; these were both of them systems of law framed wholly by English statutes. It cannot be denied to be a maxim that '*mentio unius exclusio est alterius.*' And it may be said that the legislature, in making these two exceptions, evinced their impression, that, if they had not made them, the poor laws and bankrupt laws would, under the words which they had used before in the statute, have been introduced into the province. The argument, consequently, applies *quantum valeat*; but I am of opinion that we cannot allow it so much force as to admit that every English statute of a general nature, not excepted, is in force because it was not excepted. The legislature, looking on the poor laws and bankrupt laws as unsuited to the condition of the colony, were determined to leave no room for doubt as to their exclusion; and, therefore, for greater caution, expressly excepted them; but if we were, therefore, now to hold that all statutes which they have not excepted, and which could by their nature be enforced here, must, therefore, be binding upon us, we should be making great, and, I fear, absurd, changes in our system of laws, as it has been always hitherto received and acted upon here. The game laws, for instance, are not excepted in the statute; nor the statutes which disable persons from using a trade who have not served seven years apprenticeship (s), nor any of the multitude of acts relating to certain trades and manufactures; and, indeed, it would be easy to enumerate a long list of statutes, all actually capable of being acted upon in this country, but which, having been passed upon grounds and for purposes peculiar to England, and either wholly or in a great degree foreign to this colony, have never been attempted to be enforced here, and have never been taken to apply to us. And, indeed, several occasions have arisen in

(s) See *ante*, p. 98.



which this court has determined, with respect to certain British statutes passed before our provincial statute 32 Geo. III. c. 1, that they formed no part of the law of this province, not having provisions in their nature applicable, and such as it could be supposed the legislature intended to introduce under the general words used by them; these words, too, it must be remarked, are not such as expressly introduce the whole civil law of England; they seem rather intended to be more prudently limited to the purpose of giving the principles of English law, modified, of course, as they may have been by statutes, as the rule of decision (t) for settling questions as they might arise relative to property and civil rights. Still it must be confessed that a wide field is opened for disputes by the term civil rights. Among a man's civil rights it may be argued is the right of disposing of his property as he thinks fit. And when he has made a disposition of it, the legality of which is questioned, that seems to present a point which must be solved, since our statute 32 Geo. III. c. 1, by conceding what a man in the exercise of his civil rights might in such a case do in England, and taking that as the rule for deciding the controversy between the persons claiming under the disposition which may be questioned, and the person who would be entitled to the property as the representative of the deceased, if he had not the power to dispose of it as he has done. To decide these constitutional points, for such they are, upon principles so manifestly clear and consistent as to keep free from all appearance of conflicting decisions, is more, I apprehend, than it can be hoped to attain. That *misera servitus* which is said to exist where '*jus est vagum*' is so justly dreaded in these times, that no one can consent to admit that there exists in any tribunal an arbitrary discretion to say what British statutes shall be in force here, and what not; and yet, on the other hand, in the present state of our jurisprudence, there cannot be said to be any other method of settling all these doubts as they arise, *than for courts of justice to determine them, not by any arbitrary exercise of their will, for they can claim no*

(t) See *Moulson v. Commercial Bank*, 2 U. C. Q. B. 338, involving the question how far the English Bankruptcy Act was introduced by the first Canadian Bankruptcy Act, which used much the same form of expression.

*such right, but upon the best views which they can take of arguments which cannot in their nature lead to any clear and incontestable conclusion (u).* To repeat what I have already quoted from Mr. Justice Blackstone, 'What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided, in the first instance by the provincial judicature, subject to the revision and control of the King and council,' and we may add, subject also to any express provision which the legislature of the mother country, or of the province, may think fit to make. With regard to this particular statute, 9 Geo. II. c. 36, when I consider the English decisions as to what are charitable uses within the intention of the Act, I cannot persuade myself that there have not been many dispositions made in this province of property, both by deed, and by will which would be held to come within the prohibitions of the statute, but which have nevertheless been acquiesced in and executed without question. In the case of *Doe dem McDonald and others v. McDougall* in this Court, Trin. Term, 3 & 4 Will. IV., the question whether this statute was in force here was discussed, and as far as I know, for the first time. The point was not determined in that case, for the judgment proceeded on other grounds of objection, which prevailed; but I recollect that I formed and expressed an opinion upon it, and that, looking to the reason of the thing, and fully concurring in the sentiments which had been delivered by Sir W. Grant, in the case of *Attorney-General v. Stuart*, I was disposed to look upon the statute as not binding in this province, and that would still be my opinion, if the point were left to depend wholly on the effect of our statute 32 Geo. III. c. 1. I think the reasoning of the Master of the Rolls, as applied to the particular provisions and exceptions in that statute, is obvious and irresistible, and that it should lead us to say, that the legislature, if they had given no other evidence of their intention than is to be found in statute 32 Geo. III. c. 1, did not intend by that Act to introduce the statutes of Mortmain, among which the 9th Geo. II. is usually, though not very accurately, classed. But my opinion is that we cannot properly hold that opinion now, after the legislative

(u) Compare with this the language of Mr. Justice Hill, in *Nova Scotia*, ante, p. 87.

exposition which has been afforded, and especially in recent times, of the assumed effect of that statute. The legislature, it is admitted, are the best interpreters of their own laws, and to say nothing of other evidences they have given of their understanding upon this point, by the Church Temporalities Act passed in 3 & 4 Vic. c. 78, they have provided that lands may be conveyed to such uses, for the benefit of the United Church of England and Ireland in this province, as would clearly have been prohibited by the British statute 9 Geo. II., and they have shown it to be their understanding that without such express legislative authority, the English statutes of Mortmain would have restrained parties from making such a disposition, for they have added the words 'the Acts of parliament commonly called the statutes of Mortmain, or other Acts, laws, or usages to the contrary thereof notwithstanding,' 9 Geo. II. c. 36, being commonly regarded as one of these statutes of Mortmain; but the legislature not being really anxious to relieve parties in this instance entirely from its restrictions, they accompanied the authority given by the Act with limitations in the same spirit, though not to the same extent, as those contained in the 9 Geo. II. c. 36. They only give validity to deeds conveying lands to the use of the church, provided such deeds shall be made and executed six months at least before the death of the person conveying the same, and shall be registered within six months after his decease. The recognitions by the legislature to which I have alluded, are subsequent to the discussion of the question in *Doe dem McDonell et al. v. McDougall et al.*, whether the statute 9 Geo. II. c. 36, was or was not binding in Upper Canada. We can hardly suppose a point more especially within the province of the legislature to decide, than whether a particular part of the statute law of England is or is not so far in its nature applicable to the state of things in this province, that it may in reason be considered to be included within the operation of the statute which they had themselves passed, introducing the law of England relative to property and civil rights.

"If, after the Church Temporalities Act, which I have particularly referred to, and which certainly is based on the assumption of the statutes of Mortmain being in force here, we



were to hold that the statute in question, 9 Geo. II. c. 36, is not in force, then this incongruity would follow, that while people would be restricted from conveying lands to religious and charitable uses connected with the Church of England, in any other manner than by a deed made six months before the death of the grantor, and registered within six months after, they might convey their lands to religious and charitable purposes connected with any other denomination of Christians, without any restrictions whatever, and might devise all their estates to such uses, even upon their death-beds. What is said by the Master of the Rolls, in *Curtis v. Hutton* (v), very strongly accords with this view of the case. If the legislature had left the subject of Mortmain untouched, making no reference to it in any of their Acts, then I think for the reason given by Sir W. Grant, in *Attorney-General v. Stuart*, we should have held that the statutes of Mortmain were not introduced by the provincial statute 32 Geo. III. c. 1; but to treat them as inapplicable to this province, and on that ground to keep them wholly out of view, after what the legislature has done in contemplation of their being in force, would lead to greater inconveniences and inconsistencies than those which Sir William Grant has pointed out as arguments against their being held generally inapplicable to the colonies. We ought, in my opinion, now to take into our view all that the legislature has done bearing on this question; and doing so, we must hold that the statute 9 Geo. II. c. 36, is part of our laws, and that under it the disposition made by the testator by the will in this case is void, and that the estate has consequently devolved on the heir-at-law, the lessor of the plaintiff."

It should be remarked, however, that Jones and McLean, JJ., appear to have entertained the view that the statute in question was introduced by 32 Geo. III. c. 1, as being a part of English law *capable of application* to Upper Canada, but both treat the question of applicability as one proper for consideration. McLean, J., puts it thus:

"It is evident from the words of the statute, that they '*shall form the rule*' for such decisions, that the legislature must have



been well aware that in very many other matters, as well as in reference to the Poor and Bankrupt laws, the laws of England were wholly inapplicable to the circumstances of this province, and could not therefore be introduced as a body of laws to be enforced in all cases. They are therefore only to form the rule in all matters in which they can properly and reasonably be brought into operation here. The statutes of Mortmain form a part of the law of England introduced as the rule of decision in all cases coming under their operation, and there is nothing to prevent their application to the circumstances of the country." on the effect of subsequent legislative recognition they agreed with the Chief Justice, and the unanimous judgment of the court was that the statute had the force of law in Upper Canada.

The general tenor of the decisions in the other cases involving a consideration of this statute down to 1876, will sufficiently appear by the following extract from the argument of counsel in the case in appeal about to be noted: "*Hallock v. Wilson* (*w*) follows *Doe Anderson v. Todd*, and proceeds on the ground that registration is substituted for enrolment, and that the statute 9 Geo. II. c. 36, is in force, because certain provincial statutes have recognized it as being in force. *Mercer v. Hewston* (*x*) expresses a doubt whether the statute is in force. That decision follows *Doe Anderson v. Todd*, as being the law until otherwise determined by the Court of Appeal. *Anderson v. Dougall* (*y*) and *Anderson v. Kilbourn* (*z*) do not discuss the question whether the statute is in force or not; and *Davidson v. Boomer* (*a*) concedes that the statute is in force in this province, following *Doe Anderson v. Todd*; but in *Hambly v. Fuller* (*b*) the judgment only states that it must be held that the statute is in force, upon the above authorities, until otherwise decided by the Court of Appeal.

(*w*) 7 U. C. C. P. 29.

(*z*) *Ib.* 219.

(*x*) 9 U. C. C. P. 349.

(*a*) 15 Grant, 1, 218.

(*y*) 13 Grant, 164.

(*b*) 22 U. C. C. P. 142.

Ferguson v. Gibson (*c*) follows the above authorities without discussing whether the Act is in force or not."

The whole matter came finally before the Court of Appeal for Ontario in the case of Whitby v. Liscombe (*d*). The opinions delivered by the eminent judges who decided the case show the same marked difference of opinion as was apparent in the early case—a decided difference in principle—although the judgment of the court was unanimous that the statute is in force in Ontario, because all agreed in holding that the legislative recognition of its binding force here (particularly *since* 1845) was sufficient to incorporate it amongst the laws of Ontario (*e*). Chief Justice Draper expresses a clear opinion that the provincial statute 32 Geo. III. c. 1, was sufficient, *per se*, to introduce the Mortmain Acts, and from his language it might even be argued that he considered the question of applicability not open: "The question before us is whether our legislature have not made it part of our laws; and but for the case of Attorney-General v. Stewart, I should never have entertained a doubt on this point." And again, referring to the English laws as to the poor and to bankruptcy, and another statute subsequently excluded, he says: "The reason given, that the provisions of those Acts were inapplicable to this province, is virtually one of the reasons for Sir W. Grant's judgment in the Attorney-General v. Stewart; but our legislature evidently did not doubt that their first Act had introduced both these British statutes into Upper Canada." On the other hand, Mr. Justice—afterwards Chief Justice—Moss, agreed fully with the view expressed by Robinson, C.J., in the early case, that by the effect of our provincial Act 32 Geo. III. c. 1, *per se*, the Act in question was not in force. Reviewing that case, he said:

(*c*) 22 Grant, 36.

(*d*) 23 Grant 1.

(*e*) Only on this ground is Reg. v. Gamble and Boulton, 9 U. C. Q. B. 546, supportable. See notes to B. N. A. Act, ss. 18 and 69 *post*.

“The question of principal interest in this case is whether the statute commonly called the Mortmain Act is in force in this province. More than thirty years ago the Court of Queen’s Bench, upon full consideration, held that it was in force. Since that time, in express deference to that authority, the Courts of Common Law and the Court of Chancery have decided many cases, and many devises and bequests to charitable uses, otherwise unimpeachable, have been adjudged invalid. The point is now for the first time raised in a Court of Appeal. So many estates have been administered and so many titles have been acquired upon the assumption of the correctness of a decision which had been followed so often by courts of co-ordinate jurisdiction, and remained so long unchallenged on appeal, that its reversal would be attended with serious consequences. Under such circumstances, it would deserve consideration whether the case was not a fitting one for the application of the rule—*stare decisis*. . . . If the only question was whether *Doe Anderson v. Todd* was well decided, I should hesitate long before holding in the affirmative. The points then presented for determination were, whether the provincial statute 32 Geo. III. c. 1, should have been judicially interpreted to have the effect of introducing the Mortmain Act, and, if not, whether subsequent legislation had effected a change in the law. Robinson, C.J., was of opinion that but for subsequent legislative exposition, the true interpretation of the statute of Geo. III. excluded the Mortmain Act, while the other members of the court seemed to have entertained a different view. The reasoning of the Chief Justice appears to me to be unanswerable—at least, if the decision of Sir Wm. Grant, in *Attorney-General v. Stewart*, is correct, and, apart from its intrinsic force, it would be hopeless to impugn this, after its approval by the House of Lords, in *Whicker v. Hume* (*f*). It was attempted in the argument of this appeal to distinguish *Doe Anderson v. Todd*, and withdraw it from the application of the principles enunciated in the two English cases. I do not think the attempt was attended with success. It proceeded upon the differences in the terms employed in introducing the laws of England into this province, and into Grenada and New South Wales respectively. Our statute enacted that

(f) 16 Jur. 39.

‘in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision of the same.’ In Grenada, justice was to be administered, as near as might be, according to the laws of England. In New South Wales, the laws in force in England, ‘so far as they can be applied within the said colonies,’ were introduced. Sir Wm. Grant held that ‘the question of whether the statute was in force in Grenada depended upon this consideration—whether it be a law of local policy, adapted solely to the country in which it was made, or a general regulation of property, equally applicable to any country in which it is by the rules of English law that property is governed;’ and, having discussed the scope of the statute, he decided it to be local in its character, and not a general regulation of property. In *Whicker v. Hume*, Lord Cranworth emphatically says: ‘With regard to this statute of Mortmain, ordinarily so called, I cannot have the least doubt that that cannot be regarded as applicable to the colonies.’ This being the construction placed upon the statute by such high authorities, the respondents were forced to the broad construction, that *all* the laws of England relative to property and civil rights, whatever might be their historical origin, or however political their character, or however clearly they grew out of local circumstances, or were meant to have a local operation, were introduced. The observations of the Chief Justice, in *Doe Anderson v. Todd*, seem to me to effectually dispose of this proposition. As he points out, the language of the statute does not expressly introduce the whole civil law of England, but seems to be limited to the purpose of giving the principles of the English law as the rule of decision for settling questions, as they might arise, relative to property and civil rights. If this be the correct view, I cannot perceive that any substantial distinction can be founded upon the differences of language to which I have referred.”

He, however, doubted the propriety of the decision in that case, as founded on too slight a legislative recognition of the Imperial Act as being in force here, and concluded his opinion by saying: “It is upon the ground of this *subsequent* legislative recognition that I wish to place my



judgment, that the statute must now be held to be in force in this province " (g).

*Stark v. Ford* (h) is the rather amusing record of an unsuccessful attempt to subject a Canadian judge to the penalties provided in the Act "for abolishing the Court of Star Chamber," 16 Car. I. c. 10. Upon examination of the statute, Robinson, C.J., points out that its whole scope was [to] forever put a stop to the unconstitutional usurpation of judicial functions by the Court of Star Chamber, and ridiculed the idea of extending it to a judge alleged to have acted illegally in the exercise of his assigned duties.

At the date of the passing of the Provincial Act, 32 Geo. III. c. 1, the law of marriage—both as to the forms to be observed, and as to the disabilities which would prevent its solemnization in certain cases—in force in Great Britain, was regulated by the statute commonly known as Lord Hardwicke's Act, 26 Geo. II. c. 33. Since 1792, many provincial statutes have made provisions on many, if not most, of the matters legislated upon by Lord Hardwicke's Act (i); but, as late as 1887, the latter statute has been expressly recognized as introduced—as a whole—by our first provincial Act. The reasons given for so considering it in force, constitute the material matter for us in this enquiry, and by way of contrast we may note the reasons given for holding—as has in 1889 been finally held—that section 11 of the Act was never introduced into our law.

"That section rendered such marriage by license"—*i.e.*, of a minor without consent of parent or guardian—"absolutely void, without any sentence of the court; and length of cohabita-

(g) See *Smith v. Methodist Church*, 16 O. R. 199; *Butland v. Gillespie*, *ib.* 486.

(h) 11 U. C. Q. B. 363.

(i) The whole matter has never been taken up by our legislatures because of the differences in religious view on the question in Upper and Lower Canada respectively; and note the division of the subject between the Dominion and the provinces under the B. N. A. Act, s. 91, s-s. 26, and s. 92, s-s. 12.

tion and birth of children afforded no ground of exemption (*j*); and consent subsequently given would not avail to validate. This rigorous law was soon after repealed in England, and no judge has regarded with favor the proposal to hold it applicable to this country. Judicial opinion as reported is all the other way."—*Per* Boyd, C., in *Lawless v. Chamberlain* (*k*). "Whether the 11th section of the Act containing that provision was ever part of the law of this province, by virtue of our adoption of the law of England, may fairly be questioned. If it ever was, it must be so still, as we have already mentioned, because the English statute repealing it is of too modern a date to be binding upon us by virtue of our statute 32 Geo. III. c. 1, and it has no relation to the colonies; but it would be difficult to satisfy ourselves, we think, that it ever has been in force in Upper Canada, on account of the impossibility of applying the 12th clause to the condition of things here. We could not therefore have the enactment respecting the consent of parents in its integrity, and as it would work great hardship to have the 11th clause in force without the 12th or any other provision as a substitute for it, we shall, perhaps, if we find it necessary in any case to determine the point, find it right to determine that neither of these clauses could be taken to form part of our law of marriage under our own adoption of the law of England by 32 Geo. III. c. 1."—*Per* Robinson, C.J., in *Reg. v. Roblin* (*l*). :-

The reasons given on the other hand for holding the Act, other than the clauses in question, to be introduced here, will appear in the following passages extracted from the opinions of Robinson, C.J., Esten, V.C., and Armour, C.J., in three cases in which those judges had the question under consideration :

"When by our statute 32 Geo. III. c. 1, the provincial legislature adopted the law of England as the rule of decision . . . they adopted to the extent mentioned, not merely the common law of England, but also the statute law, with the

(*j*) *Johnstone v. Parker*, 3 Phill. 41.

(*k*) 18 O. R. at p. 309.

(*l*) 21 U. C. Q. B. at p. 355. See *Reg. v. Secker*, 14 U. C. Q. B. 604, and *Reg. v. Bell*, 15 U. C. Q. B. 237.

exceptions specified in the Act, and with other exceptions, though not specified, of such laws as are clearly not applicable to the state of things existing in the colony, of which various examples might be cited.

“We consider that our adoption of the law of England to the extent and with the exceptions just mentioned, included the law generally which related to marriage. The statute 26 Geo. II. c. 33, being in force in England when our statute was passed, was adopted, as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time ‘relative to civil rights’; that is, to the civil rights which an inhabitant of Upper Canada may claim as a husband or wife, or as lawful issue of a marriage alleged to have been solemnized in Upper Canada.

“The legislature of Upper Canada have so regarded this matter, as appears by the statute 33 Geo. III. c. 5, secs. 1, 3 and 6; 38 Geo. III. c. 4, s. 4; and 11 Geo. IV. c. 36, in which they have recognized the English Marriage Act, in effect, though not in express terms, as having the force of law here in a general sense, and controlling the manner in which marriage is to be solemnized.”—*Per Robinson, C.J.*, in *Regina v. Roblin (m)*.

“No doubt the Act of the 32nd of the late King, introduced all the law of marriage as it existed in England at that date, excepting, perhaps, some clauses of the 26 Geo. II. c. 33. It introduced the Acts 25 Hen. VIII. c. 22; 28 Hen. VIII. c. 7 & 16; and 32 Hen. VIII. c. 38, so far as they remained in force, and so much of the canon law as had been adopted by the law of England.”—*Per Esten, V.C.*, in *Hodgins v. McNeil (n)*.

“The legislature of this province has repeatedly recognized that Act as being in force in this province, by from time to time passing laws modifying and qualifying its provisions. See 33 Geo. III. c. 5; 38 Geo. III. c. 4; 2 Geo. IV. c. 11; 11 Geo. IV. c. 36.

“Having regard to the provisions of the Acts 32 Geo. III. c. 1, and 40 Geo. III. c. 1, to the cases above referred to, and to the recognition thereof by the legislature of this province, as above mentioned, I am clearly of opinion that the Act 26 Geo. II. c. 33, was brought into force in this province by the Acts

(m) 21 U. C. Q. B. at p. 355.

(n) 9 Grant, at p. 309.

32 Geo. III. c. 1, and 40 Geo. III. c. 1, so far as its provisions were applicable to the circumstances of this province, and were not inconsistent with the civil institutions thereof; and that, at all events (which is all that I am concerned with in this case), the provision thereof making all marriages which should be solemnized without publication of banns or license of marriage from a person or persons having authority to grant the same, first had and obtained, null and void to all intents and purposes whatsoever, was brought into force.

“Unless this provision was so brought into force in this province, there is no provision in this province making void a marriage so solemnized, and the fact that the legislature of this province has never deemed it necessary to make any such provision, is cogent evidence that it considered it unnecessary to do so; because this provision of 26 Geo. II. c. 33, was treated by it as being in force in this province.”—*Per* Armour, C.J., in *O'Connor v. Kennedy* (o).

From the above cases it will be seen that in reference to Lord Hardwicke's Marriage Act the same principles were invoked as in reference to the Mortmain Acts. In each case the court considered:

1st. Is the British statute one which can be considered as so applicable to the circumstances of this colony, that the legislature must have intended to introduce it by the intrinsic effect of their Act 32 Geo. III. c. 1? This question, in the case of the Mortmain Acts, does not seem to have been unanimously answered by Canadian judges, but the weight of authority would appear to be for a negative answer—in conformity, as will have been noticed, with English decisions. As to the Marriage Act of Lord Hardwicke, there seems to have been no difference of opinion—all agreeing in the result arrived at, in favor of an affirmative answer, except as to the 11th and 12th clauses.

2nd. Has there been subsequent legislative recognition by the provincial parliament, of the binding force here of the Act in question? As to both Acts, the answer has been



unanimously in the affirmative. To these considerations may be added :

3) 3rd. Have the decisions of provincial courts proceeded so clearly upon one line, and for such a length of time, as to have established a rule of law in regard to dealings with property, or in regard to the *status* of particular classes of persons? In the later cases there can be no doubt this consideration operated most powerfully. In *Whitby v. Liscombe* (*p*), in 1876, Mr. Justice Burton uses this language : " Where solemn determinations which establish a rule of property have been acquiesced in for so long a period, a court even of last resort should require very strong grounds for interfering with them " ; and Mr. Justice Patterson, speaking of *Doe v. Anderson v. Todd*, says : " It has been acquiesced in too long, and has for too long a period governed titles to land in this province to be now interfered with by any authority short of legislative enactment " ; and we have already quoted the opinion of Mr. Justice (afterwards Chief Justice) Moss, in which the same rule of expediency is expressed in those polished periods by which his written opinions are always characterized.

The case *Hesketh v. Ward* (*q*), brings into prominence another question proper for consideration, in deciding whether or not a particular Imperial Act (we are of course dealing with Acts in force in England on 15th October, 1792) is in force in Ontario, namely, the question—Is the Act one of general application in England, or is it local, in the sense of being confined to some particular locality or local institution in England? Upon a review of the cases already mentioned, this consideration will appear to have been always present to some extent, but in *Hesketh v. Ward* it was the real point for decision. The Acts in question there, were 1 Anne (st. 2) c. 6, and 5 Anne, c. 9, making certain provisions in reference, amongst other matters, to escape warrants. Richards, C.J., after a careful

(*p*) 23 Grant, 1.

(*q*) 17 U. C. C. P. 667. See *ante*, p. 93.

consideration of the first-mentioned statute, decided that it was not part of our law, because "passed with reference to the peculiar position of the officers of the prisons"—the Marshalsea and the Fleet—"to which it referred, and the evils recited in the preamble, which state of things has not, and is not likely to exist in this country"; and again because "in terms it is only applicable to the two English prisons named in it; to remedy evils which the preamble . . . refers to as peculiar to persons of the descriptions there referred to, and as to which no apparent necessity exists in this country." The dissenting opinion of Mr. Justice Wilson (afterwards Chief Justice Sir Adam Wilson) is not a dissent in principle, but a joiner of issue on the facts. After a lengthy historical discussion, showing his usual painstaking research, he points out that, "Although it may have a limited application in England to the two special and peculiar prisons of the courts, it is nevertheless a general law, and a beneficial one, and an amendment of the law, and as there are no special prisons of the courts here, but all the gaols of the province are equally the prisons of the court, the statute, being such general law by the declaration of the statute itself, has an operation here upon all the prisons of the courts" (r).

In a series of cases it was held that the provisions of 14 Geo. III. c. 78, relating to the liability of persons upon whose premises a fire accidentally starts, for damages resulting from its spreading to the premises of another, are part of our law, because they were part of the general law of England, introduced by 32 Geo. III. c. 1, and were not of local application there in the sense before referred to (s).

(r) On this principle, many English statutes referring to, *e.g.*, the courts "at Westminster" have been held to be part of *general* English law, and as such in force here in relation to our Superior Courts. See 43 Eliz. c. 6, and 13 Car. II. c. 2, as to costs in certain cases, and note the New Brunswick decisions on this point, *ante*, p. 93.

(s) *Gaston v. Wald*, 19 U. C. Q. B. 586; *Stinson v. Pennock*, 14 Grant, 604; *Carr v. Fire Ass.*, 14 O. R. 487; *C. S. R. v. Phelps*, 14

The cases heretofore considered have had relation to the effect of 32 Geo. III. c. 1, and the phraseology employed in that Act, has been relied on in support of the contention for a limited introduction of the English statutory law relating to property and civil rights. We now turn to the Provincial Acts, by which the English criminal law was introduced into this province, and the limits of its applicability defined. As has been already noticed, the Quebec Act, 1774, (14 Geo. III. c. 83), while re-introducing the law of Canada—*i.e.*, the French law in force at the conquest—into the Province of Quebec, as described by the Act, provided for a continuation therein of the criminal law of England.

“ XI. And whereas the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants from an experience of more than nine years, during which it has been uniformly administered; be it, therefore, further enacted by the authority aforesaid, that the same shall continue to be administered, and shall be observed as law in the province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted, to the exclusion of every other rule of criminal law or mode of proceeding thereon, which did or might prevail in the said province before the year of our Lord 1764;

S. C. R. 132. For other cases in Upper Canada (Ontario) on this subject, see *Torrance v. Smith*, 3 U. C. C. P. 411, and *Hearle v. Ross*, 15 U. C. Q. B. 259, in which 26 Geo. III. c. 86, exempting vessel owners from liability for loss through fire, was held to be part of our law: *Reg. v. McCormick*, 18 U. C. Q. B. 131—*Nullum Tempus Act* (9 Geo. III. c. 16), in force here; *Dunn v. O’Rielly*, 11 U. C. C. P. 404, in which the clauses in 22 Geo. II. c. 46, relating to attorneys, were held to be in force here, although other parts of the Act inapplicable (a veritable witches’ cauldron, this!); *Reg. v. Row*, 14 U. C. C. P. 307, in which 28 Geo. III. c. 49, s. 4 (enabling a magistrate for a county-at-large to sit within a city, itself a county, within the boundaries of the county-at-large), was held not to be in force, being local in its character; *Bleeker v. Myers*, 6 U. C. Q. B. 134; *Hart v. Meyers*, 7 U. C. Q. B. 416; *Garrett v. Roberts*, 10 O. A. R. 650—18 Eliz. c. 5, as to suits by *informers*, in force here.

everything in this Act to the contrary thereof in any respect notwithstanding; subject, nevertheless, to such alterations and amendments as the Governor, Lieutenant-Governor, or Commander-in-Chief for the time being, by and with the advice and consent of the legislative council of the said province, hereafter to be appointed, shall from time to time cause to be made therein in manner hereinafter directed."

The Constitutional Act of 1791, while dividing the Province of Quebec into Upper and Lower Canada, left each province with the law as it stood under the Act of 1774 (except of course as altered by provincial ordinances), but gave each province a legislature empowered to make laws for the peace, welfare and good government thereof. What Upper Canada would do, was pretty well understood. As was anticipated, she annuled the old French law, and adopted the law of England as the rule for decision of all controversies relative to property and civil rights; and she not merely adhered to the criminal law of England, as introduced by the proclamation of 1763, and continued by the Quebec Act, above quoted, but she went further, and by 40 Geo. III. c. 1, enacted that "the criminal law of England as it stood on the 17th day of September, A.D. 1792, shall be, and the same is hereby declared to be, the criminal law of this province."

Under this statute, every Act of the British parliament in force as part of the general criminal law of England on the 17th day of September, 1792, was introduced into Upper Canada. The date in reference to which the English criminal law should be considered in force was thus brought forward by 18 years, and under it, as well as under the Quebec Act of 1774, the enquiry proper under the common law as to the applicability of an Imperial Act to the circumstances of a colony was eliminated, and the only enquiry is—Is the Imperial statute local in the sense we have mentioned? If not, it is part of the law of Upper Canada.



We must, however, again repeat that we are dealing in this chapter with English statutes of no express application to the colonies, and the Provincial Act, 40 Geo. III. c. 1, applies only to such statutes (*t*). Imperial Acts which, *proprio vigore*, apply to us, are treated of elsewhere. With this repeated caution, we proceed to consider some Canadian authorities upon the question of the introduction of English criminal law into Upper Canada (*u*).

In *Beasley, qui tam, v. Cahill (v)*, it was held that the Imperial statute, 32 Hen. VIII. c. 9, against buying disputed titles, was in force in Upper Canada. It was contended that the statute was obsolete, even in England, and Robinson, C.J., remarked that this seemed to him rather singular, as the reasons assigned in the preamble of the Act for its passing, were reasons sufficient in all times: but notwithstanding that it seemed to have remained so long a dead-letter in England, he held the Act to be in force in Upper Canada, because "it constitutes part of the criminal law of England, which we have adopted by an express statute, introducing it as it stood in England on the 17th September, 1792" (*w*).

In *Regina v. Mercer (x)*, certain English Acts against the buying and selling of offices were considered (5 & 6 Edward VI. c. 16, and 49 Geo. III. c. 126). The latter Act it will be noticed, is of a date subsequent to 1792, and does not therefore fall within our present enquiry; it was however held to be of express colonial application, and there-

(*t*) *Bank of U. C. v. Bethune*, 4 U. C. Q. B. (O. S.) 165; see *ante*, p. 69.

(*u*) Since the above was written, the "Criminal Law" of Canada has been codified, and (it is understood) all necessity for reference to English criminal law obviated. As, however, the "criminal law" over which the Dominion parliament has legislative power, does not cover the whole field of penal legislation, what we have written may still be applicable in a few cases even in Ontario.

(*v*) 2 U. C. Q. B. 320.

(*w*) And see *Purdy q. t. v. Ryder*, Tay. 236.

(*x*) 17 U. C. Q. B. 632; see also *Foots v. Bullock*, 4 U. C. Q. B. 480, and *Reg. v. Moodie*, 20 U. C. Q. B. 389.

fore in force here. The Act of Edward VI. was unanimously held to be part of our law. Robinson, C.J., adverts to the distinction between the two provincial Acts, 32 Geo. III. and 40 Geo. III., in the following language :

“It is denied that this statute has any force in Upper Canada. If that point depended merely on the question whether it is included in our adoption of the law of England, under our statute 32 Geo. III. c. 1, . . . a good deal might be urged against the application of the statute. . . . It is more to the purpose, I think, to consider whether 5 & 6 Edward VI. c. 16, should not be held to be in force here under our adoption of the criminal law of England by 40 Geo. III. c. 1, which enacted that the criminal law of England as it stood on the 17th of September, 1792, shall be, and it was thereby declared to be, the criminal law of Upper Canada. I think it must be held that the statute formed part of the criminal law of England which was thus introduced.”

McLean and Burns, JJ., were equally free from doubt.

So likewise, in a number of cases, the English Lottery Acts were held to be in force in Upper Canada; *Cronyn v. Widder* (y) being the leading case. Both in this case and *Regina v. Mercer*, above noted, it was urged that the statutes were not criminal statutes, but with the consideration which led the court in each instance to hold these Acts to be part of the criminal law of England, we have here nothing to do. It is more to our purpose to observe that having held them to be part of the English criminal law, the court applied them as part of the criminal law of Upper Canada, without entering upon any inquiry as to their adaptation or want of adaptation to the circumstances of Upper Canada.

And in *Reid v. Inglis* (z), Draper, C.J., speaking of the Act 1 Wm. & Mary, c. 18, “against disturbers of religious

(y) 16 U. C. Q. B. 356, and see *Corby v. McDaniel*, *ib.* 378. In earlier cases referred to in these, the Acts were not questioned.

(z) 12 U. C. C. P. 191.

meetings," said: "I see no reason for holding that the Act is not in force here;" from which we would infer that, in his opinion, all English criminal statutes in force in England in 1792, are *prima facie* in force here (a).

And now—even at the risk of a charge of undue repetition—we must again point out, that in any case, the question whether or not any particular British statute of date anterior to 1792, has the force of law in Ontario, will depend, in the first place, upon the absence of colonial legislation—Canadian or Provincial, as the case may be—on the subject matter involved. If there is none such, then the principles we have ~~enumerated~~<sup>enunciated</sup> in the cases we have reviewed, will have to be considered, and may be summarized shortly by saying:

*As to the criminal law*, no question can arise, save the one question—Is the act one of general English application? If so, it is, in the absence always of colonial legislation, as above specified, part of our law under 40 Geo. III. c. 1.

*As to property and civil rights*, the following points must be considered: (1) Is the Act one of general English application in the sense we have mentioned? (2) If so, is it an Act properly applicable to the circumstances—the commercial, religious, and social environments—of this province? (3) If not so applicable, or if the matter is one of reasonable doubt, has there been a legislative recognition of the Imperial Act, as being in force here? (4) Have the decisions of the courts proceeded so clearly upon one line, as to have established a rule of property or *status* in the province?

It will be seen that, owing to the recognition by Upper Canadian judges of the propriety of making an inquiry as

(a) See *Sheldon v. Law*, 3 U. C. Q. B. (O. S.) 85, and *Fulton v. James*, 5 U. C. C. P. 182 (horse-racing); *Reg. v. Milford*, 20 O. R. 306 (9 Geo. II. c. 5, against fortune telling), and *Reg. v. Barnes*, 45 U. C. Q. B. 276 (Lord's Day Act).

to the applicability of any Imperial Act to the circumstances of this province, the principles upon which the decision must rest, in the case of any given statute, are the same (except as to criminal statutes) as those laid down in the decisions of the Nova Scotia and New Brunswick courts, and, as we shall hereafter see, the statutes by which this question is governed in the provinces more lately acquired, expressly make "applicability" the test of their introduction.

The English authorities upon this subject are sufficiently referred to in the extracts taken from the Canadian authorities. As pointed out by Chief Justice Halliburton, in *Uniacke v. Dickson* (b), those authorities lay down no very definite principle to guide colonial judges in coming to a decision in this very important matter; and, for this reason, we have gone more elaborately into the authorities in the older provinces than might seem necessary, so far as those older provinces alone are concerned; but, owing to the comparatively recent dates which have been fixed upon in the lately acquired provinces (c), as the date for the introduction of English law, the questions discussed in this chapter are certain to be of frequent occurrence in those provinces, and we, therefore, leave this chapter as originally written.

So far as the province of Ontario is concerned, the matter now stands :

*As to the law relative to property and civil rights—* upon R. S. O. (1887) c. 93, in which, after reciting 32 Geo. III. c. 1, the Legislative Assembly of Ontario enacts as follows :

"1. In all matters of controversy, relative to property and civil rights, resort shall continue to be had to the laws of England, as they stood on the said 15th day of October, 1792, as the rule for decision of the same, and all matters relative to testimony and legal proof in the investigation of fact, and the

(b) *Ante*, p. 78.

(c) *Post*, Chap. XIII. *et seq.*



forms thereof, in the several courts in Ontario, shall continue to be regulated by the rules of evidence established in England, as they existed on the day and year last aforesaid, (except so far as the said laws and rules have been since repealed, altered, varied, modified, or affected by any Act of the Imperial parliament still having the force of law in Ontario; or by any Act of the late province of Upper Canada, or of the province of Canada, or of the province of Ontario, still having the force of law in Ontario, or by these revised statutes.

“ 2. The statutes of Jeofails, of limitations, and for the amendment of the law, excepting those of mere local expediency, which, previous to the 17th day of January, 1822, had been enacted respecting the laws of England, and then continued to be in force, shall be valid and effectual for the same purposes in Ontario, excepting so far as the same have, since the day last aforesaid, been repealed, altered, varied, modified, or affected in the manner mentioned in section 1 of this Act.”

*And as to the criminal law*—upon R. S. C. (1886) c. 144, by section 1 of which it is enacted as follows :

“ The criminal law of England, as it stood on the 17th day of September, in the year 1792, and as the same has since been repealed, altered, varied, modified, or affected by any Act of the parliament of the United Kingdom, having the force of law in the province of Ontario, or by any Act of the parliament of the late province of Upper Canada, or of the province of Canada, still having force of law, or by any Act of the parliament of Canada, shall be the criminal law of the province of Ontario.”

QUEBEC:—The position of this province is so entirely unique, that reference to its legal system is of no aid in the other provinces. Its civil law (founded on the “*Code Civile*” of Napoleon) has since been recast into a provincial code, and no reference to English law is in order in that province in the sense we are now discussing. As to the criminal law, its recent codification obviates any further reference to it.

## CHAPTER VI. <sup>16 pp</sup>

### THE PREROGATIVES OF THE CROWN.

There has been no more fruitful cause of dispute and debate, in reference to the government of the British colonies, than the lack of a proper understanding of that branch of English law which relates to the "prerogatives of the Crown"; and within a comparatively recent period the same want of appreciation of the essential principles which underlie that law has given rise to notable disputes (a) between the executive authorities of the Dominion and of some of the provinces, as to which executive head—the Governor-General or Lieutenant-Governor—should exercise the prerogatives in certain cases. And, in truth, this lack of a proper grasp of the situation is not much to be wondered at: and, for this reason, that the authorities on this branch of law (b) so mix statements of law with hymns of praise and ascriptions of attributes almost divine to the wearer for the time being of the Crown of England, that it is a difficult task to disentangle the thread of legal prin-

(a) *Atty.-Genl. (Can.) v. Atty.-Genl. (Ont.)*, 19 O. A. R. 31, affirming 20 O. R. 222; see *Lenoir v. Ritchie*, 3 S. C. R. 575. The question about the appointment of Queen's Counsel is now standing for argument before the Court of Appeal for Ontario.

(b) "A topic that in some former ages was ranked among the *arcana imperii*; and, like the mysteries of the *bona dea*, was not suffered to be pried into by any but such as were initiated in its service; because, perhaps, the exertion of the one, like the solemnities of the others, would not bear the inspection of a rational and sober enquiry."—Blackstone.

ciple which runs through it (*c*). The old juristic saw, *ubi jus est vagum ibi misera servitus*, has no more forcible illustration than in the history of the struggles of the English people to free themselves from the despotism of government by prerogatives, unearthed by the industry of servile lawyers, and tortured into legal justification for executive oppression.

It is absolutely necessary to clear up this vagueness and to assign a definite position in English jurisprudence to that branch of it which relates to these "prerogatives."

It would be highly interesting, but altogether beyond the scope of this work, to enter upon a philosophic enquiry into the relative antiquity of the legislative and executive departments of government—the law-making and the law-executing power—or even upon the more limited enquiry into their relative position, historically considered, in British jurisprudence. We can merely say, that from time immemorial there has been a clear distinction drawn by jurists between these two departments. If any theory can be said to have legal validity, it would appear that the legal theory of British jurisprudence is, that further back than any court will look there was a body of law—a fundamental law (so to speak) of the constitution (*d*)—by virtue of which both King and Parliament had their legal being, and by it the relations of King to Parliament, and of each to the government of the kingdom, were regulated. This common law of England recognizes only one executive magistrate as exercising authority without commission from any other, within or without the realm. That executive magistrate is the occupant for the time being of the British throne. All other magistrates act "by commission

(c) Hagarty, C.J., speaks of the "boundless crop of venerable learning as to pardon and prerogative."—19 O. A. R. at p. 36.

(d) "The original right of the kingdom and the very natural constitution of our state and policy," *per* Yelverton, *arg.* 2 St. Tr. 483. And see Hale's Hist. of the Common Law; Broom's Const. Law, 2nd ed., p. 245, *et seq.*

from and in due subordination to him" (e). But the power and duty of this executive head is to execute the laws of the realm. He is not above those laws, but under them, being bound by them equally with the meanest of his subjects. It follows, of course, that no commission from him would carry authority to act otherwise than according to law (f). In order to the due execution of the laws, this "common law of England" has invested the executive head with certain attributes and powers, and these are collectively known as the "prerogatives of the Crown." The power to alter the law of the land was no part of these prerogatives (g); that power rested exclusively with parliament, the *lex et consuetudo* of which is equally part of the common law. Parliament consisted of the King and the three estates of the realm, Lords spiritual, Lords temporal, and Commons; and its enactments were promulgated as the Acts of the King in parliament. In theory, it would seem that defects in the law were supposed to be discovered by the executive head in the course of the administration of public affairs; whereupon, in the exercise of his prerogative right, vested in him by the common law, to summon the three estates of the realm, he would cause parliament to assemble in order that the law might (if all agreed)

(e) Chitty, "On the Prerogatives of the Crown;" 4.

(f) *Ib.* 5; Bracton, L. 1, c. 5.

(g) The power of the Crown, without parliament, to make such laws as might seem proper, for a *conquered* territory, was no exception in reality; its exercise was in the nature of executive action. See Clark, Colonial Law, 6, 8; Campbell v. Hall, Cowp. 204; and the valuable note (a) to Leith & Smith's Blackstone, at p. 19. "It has been said that, in case of territory acquired by Great Britain by conquest, inasmuch as the government is not absolutely monarchical, but the authority to impose laws is vested in the Sovereign conjointly with the two Houses of Parliament, the King therefore alone can exercise no prerogative right to impose such laws as he pleases, and consequently that the mode . . . by which the British laws were introduced into Canada after the Treaty of Paris was of no effect. See the opinion of C. J. Hey, 2 L. C. Jur., appx. in Wilcox v. Wilcox, and L. C. Jur., vol. 1, 2nd part, pp. 38-48. See also the various judgments in Stuart v. Bowman, 2 L. C. R., and in appx. to 2 L. C. Jur." See also Forsyth, 12, *et seq.*



be altered and the defect remedied. Parliament, however once assembled, might address itself, not merely to the alteration desired, but to the alteration of the law upon other matters; and the other branches of parliament, or either of them, might bargain for the latter as the price of the former. In any case, any and every alteration in the law agreed upon by the King and the three estates was thereafter part of the law, to the execution of which the power and duty of the King was limited. As it is sometimes, but not very intelligibly, expressed, the King's authority, as executive head of the nation, is subordinate to his authority as *caput et finis parliamenti* (*h*). But while parliament may enact laws—has enacted many laws—even with reference to the prerogatives of the Crown, their extent, and the mode of exercising them, still, unless parliament goes to the full extent of law-making in any given case, it cannot weaken, in the slightest degree, the legal effect of the exercise by the Sovereign of a prerogative right attributed to him by the common law; and this legal effect is what the older writers particularly notice.

So careful, indeed—the old writers put it—is the common law in its provisions for the due execution of the laws of the land: so careful to provide a check against any legislative hindrance to their smooth and expeditious working, that the executive magistrate—the Crown—is by the common law, and for the very purpose of protecting the royal executive authority (*i*), a constituent branch of parliament; and the consent of the Crown is absolutely essential to the validity of all Acts. This right to give or withhold consent, has been treated as itself one of the prerogatives of the Crown—the cover and protection to all the other prerogatives—and upon its exercise the law recog-

(*h*) See Steph. Comm. Vol. II. p. 340, as to the proper meaning of this phrase.

(*i*) Chitty, On the Prerog. of the Crown, p. 3; see *ante*, p. 33, for an extract from Gov. Cornwallis' commission, disclosing this reason in frank terms.

nizes no limitations. While from time to time parliament has withdrawn certain prerogative rights from the Crown; has, in regard to others, required the concurrence of some other person—or body of persons in order to their legal exercise; and in many ways has fettered their exercise by conditions as to time, place and manner of exercise; such action has always had the consent of the Crown, no matter how unwillingly, or under what stress of circumstances, given; and this supreme prerogative—for prerogative it may be called—of giving or withholding such consent, no power short of revolution can ever take away (*j*). This is the aspect of the question which is pre-eminently apparent in the law books, and it is the utter inadequacy of this one-side-of-the-story mode of treatment which makes this branch of the law so unintelligible to the ordinary student. He is haunted by the idea that what he is reading is largely mere antiquarianism; and yet, the statements made are statements of legal principles which he cannot gainsay. The points of importance to a proper understanding of this branch of jurisprudence, are so slurred over, that it is only by patient spelling out of what appear to be treated as minor subdivisions that we can reach a satisfactory solution of the problem. As a matter of history, parliament—perhaps we should say the House of Commons—has always found means to secure the consent of the Crown to the enactment of laws on which its heart was bent; and, leaving aside for a moment the legal necessity for such consent, let us work out the other legal principles to which we have alluded.

Back of legal memory, stands the common law of England. "The law makes the King" (*k*); the attributes and powers which attach to his office, as executive head of the

(*j*) See notes to sec. 2 of the B. N. A. Act, *post*, for a reference to the method adopted to get over this difficulty, in the case of the Bill of Rights—1 Wm. & Mary, st. 2, c. 2.

(*k*) Bracton, L. 1, c. 8; Hale, Hist. of the Common Law; Broom, Const. Law, 248.

nation, are part of that common law; are defined *and limited by* that law, and are in aid of the executive (l). Over against, or at least distinct from the King, stands Parliament. It is the creation of that same common law (m), and to parliament alone does that common law entrust the power to alter the law of the land, whether common or statutory, upon any and every conceivable subject matter. Parliament, therefore, can alter the *lex prerogativa* (n); and it needs no very extensive knowledge of English history to appreciate that the House of Commons never relinquishes what it gains of control over the executive. The history of English legislation is the history of curtailment of prerogatives, and particularly of those prerogatives in the exercise of which any large amount of discretion was open to the Crown, as to time, place and manner of exercise.

At this stage, some attempt should perhaps be made to classify the "prerogatives of the Crown" as they are enumerated in the works of such writers as Hale, Blackstone, and Chitty. One large principle of division appears in the classification of prerogatives into attributes, and prerogatives proper. The attributes of sovereignty, (or pre-eminence), perfection, and perpetuity, find expression in the sayings:—"The King is properly the sole executive magistrate" (o);—"The King can do no wrong"; and—"The King never dies." With these legal principles, and their position in English jurisprudence, we need not now concern ourselves, as they are passive.

(l) Broom, 316.

(m) Steph. Comm. (5th ed.) vol. II. p. 335.

(n) So far, indeed, does the power of parliament over the executive extend, that it can not only deal by legislation, with the *lex prerogativa*, but it can "make laws and statutes of sufficient force and validity to limit and bind the Crown and the descent, limitation, inheritance, and government thereof," at least the statute, 6 Anne, c. 7, adjudges traitors, all who affirm the contrary.

(o) Chitty, p. 4.

The prerogatives proper represented, according to the common law, powers of action in connection with every department of executive government, administrative and judicial. Even those prerogative powers in connection with the assembling, proroguing and dissolving of parliament were in aid of the executive (*p*). CHITTY divides these prerogatives proper—the line of division is not very exact—into:

1. Prerogatives in reference to *foreign states and affairs*, such as the sending of ambassadors, the making of treaties, making war and peace, and the various acts of executive government necessary in connection with these various matters (*q*).

2. Prerogatives arising from the recognized position of the Crown as *Head of the Church*, with which we in Canada need not perhaps trouble ourselves (*r*).

3. Prerogatives in connection with the assembling, proroguing, and dissolving of parliament (*s*).

4. Prerogatives annexed to the position of the Crown as the *fountain of justice* (*t*); such as the creation of courts, the appointment of judges and officers in connection therewith; the pardoning of offenders, and the issuing of proclamations.

5. Those prerogatives, which flow from the position of the Crown as the *fountain of honour*, such as the bestowing of titles, franchises, etc. (*u*).

6. The superintendency of commerce (*v*).

(*p*) See *ante*, p. 131.

(*q*) Chitty, 39.—These are all matters which, for obvious reasons, are still treated as matters of "Imperial" concern, and over which therefore colonial legislatures have no legislative power. See Chap. IX. *post*.

(*r*) Chitty, 50.—See *in re* Lord Bishop of Natal, 3 Moo. P. C. (N. S.) 115; Forsyth, 35, *et seq.*

(*s*) Chitty, 67.—See Chap. VIII. and notes to secs. 33 and 50, B. N. A. Act, *post*.

(*t*) Chitty, 75.

(*u*) *Ib.* 107.

(*v*) *Ib.* 162.



7. The prerogatives in connection with the collection of the revenue (*w*).

Sergeant STEPHEN in his new Commentaries on the Laws of England (founded on Blackstone), adopts a somewhat different division. According to his arrangement, prerogatives are either *direct*, or by way of *exception*. Of the latter he says (*x*) :

“ Those by way of exception are such as exempt the Crown from some general rules established for the rest of the community—as in the case of the maxims that no costs shall be recovered against the Crown; that the Sovereign can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects ” (*y*).

Direct prerogatives he divides into three classes, according as they regard, (1) the royal character; (2) the royal authority; and (3) the royal income (*z*). Of these divisions, the prerogatives by way of exception, and those regarding the royal authority and the royal income, correspond with Chitty's division treating of “ prerogatives proper.”

So far as the government of the United Kingdom is concerned, we may, for reasons about to be stated, abandon any further discussion in detail of these prerogatives. It requires nothing more than a cursory glance at the last edition of Stephen's Commentaries to make clear that parliament has so taken control of these prerogatives: has so fettered their exercise by conditions as to the manner, time, and circumstances of putting them into execution: has, indeed, in such a vast majority of cases, indicated the par-

(*w*) *Ib.* 199.

(*x*) Steph. Comm. p. 494, vol. II. (5th ed.).

(*y*) See *Exchange Bank v. Reg.*, 11 App. Cas. 157, in which it was held that no such prerogative right exists in Quebec; *Reg. v. Bank of Nova Scotia*, 11 S. C. R. 1, and *Maritime Bank v. Reg.*, 17 S. C. R. 657 (contrary holding as to Nova Scotia and New Brunswick). This last case has just been affirmed by the Privy Council. See note (*y*) p. 144 *post*.

(*z*) See Chap. II. *ante* p. 35, *et seq.*

ticular official by whom they are to be exercised, that—although exercised in the Sovereign's name—all discretion in connection with them has vanished. They have very largely ceased to be “common law” prerogatives, and are now statutory powers. But, before entering upon a consideration of the position of the colonies generally, and of Canada in particular, in reference to “prerogative” we must again emphasize the legal principle (*a*) that the *lex prerogativa* was part of the law of England, which parliament was able to alter and mould in such way as, in the opinion of parliament, would best conduce to the interests of the people, or—to put the same idea into different language—the law-making power in England has always been, and still is, supreme over the law-executing power, their sphere of activity being one and the same. We desire, too, to draw attention to the fact that this control by parliament over the executive, exists by law, and apart altogether from those conventions of the constitution, the observance of which secures harmony and co-operation between the two departments of government, and that this control by parliament is, in truth, the necessary result of the “rule of law.”

Upon the acquisition of a colony, what is the position of its inhabitants in reference to this *lex prerogativa*? This broad question finds very scant consideration in the text writers on this branch of law. The two following quotations exhaust all that Chitty has to say on the subject :

“Though allegiance be due from everyone within the territories subject to the British Crown, it is far from being a necessary inference that *all* the prerogatives which are vested in His Majesty by the English laws are, therefore, exercisable over individuals within those parts of His Majesty's dominions in which the English laws do not, as such, prevail. Doubtless those fundamental rights and principles on which the King's authority rests, and which are necessary to maintain it, extend even to such of His Majesty's dominions as are governed by their

(a) See Steph. Comm. (5th ed.) 332, *et seq.*

own local and separate laws. The King would be nominally, and not substantially, a sovereign over such of his dominions if this were not the case. But the various prerogatives and rights of the Sovereign, which are merely local to England, and do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported, are not, it seems, *prima facie*, extensible to the colonies, or other British dominions which possess a local jurisprudence distinct from that prevalent in, and peculiar to England. To illustrate this distinction, the attributes of the King, sovereignty, perfection, and perpetuity, which are inherent in, and constitute his Majesty's political capacity, prevail in every part of the territories subject to the English Crown, by whatever peculiar or internal laws they may be governed. The King is the head of the Church; *is possessed of a share of legislation*; and is generalissimo throughout all his dominions; in every part of them his Majesty is alone entitled to make war and peace; but in countries which, though dependent on the British Crown, have different and local laws for their internal governance, *as, for instance, the plantations or colonies*, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place (*b*). Though, if such law be silent on the subject, it would appear that the prerogative, as established by the English law, prevails in every respect; subject, perhaps, to exceptions which the differences between the constitution of this country and that of the dependent dominion may necessarily create in it. . . . In every question, therefore, which arises between the King and his colonies respecting the prerogative, the first consideration is the charter granted to the inhabitants (*c*). If that be silent on the subject, it cannot be doubted that the King's prerogatives in the colonies are precisely those prerogatives which he may exercise in the mother country. The prerogatives in the colonies, unless where it is abridged by grants, etc. (*c*), is that power over the subjects, considered either separately or collectively, which, by the common law of England, abstracted from Acts of parliament and grants of liberties, etc.,

(*b*) See *Exchange Bank v. Reg.*, 11 App. Cas. 157, with which compare *Maritime Bank v. Reg.*, 17 S. C. R. 657.

(*c*) *A fortiori*, where the charter is an Imperial Act of Parliament.

from the Crown to the subject, the King could rightfully exercise in England " (d).

The statements contained in these passages, are not very definite; but bearing in mind the two methods of acquiring colonies,—by conquest (or cession) and by settlement—and applying to each type the rules indicated, it may be laid down: (1) That in a conquered or ceded colony which continues to be governed by a foreign law (e), the *lex prerogativa* of English jurisprudence, is to be no more deemed in force there, than is any other branch of English law (f), subject as Chitty puts it, to the operation therein, of those fundamental rights and principles on which the King's authority rests and which are necessary to maintain it; (2) That in a settled colony the *lex prerogativa* of English law is carried with them by the settlers, just to the same extent and with the same conditions as to applicability (g), as is the case with the other branches of the common law, and the prerogative rights of the crown are capable of exercise in the execution of the law of a colony not having a legislative body, only to the extent indicated in the commissions of the executive officers who may be sent out (h).

The point of supreme importance to us is not however brought out, (except by inference) but it is a clear and undoubted rule of English law, that upon the establishment, by charter or Imperial Act, of a local legislature within a colony, that legislature is, within the sphere of its authority (be that sphere large or small), possessed of plenary powers of law-making, and may, with of course the consent

(d) Chitty, 25-32.

(e) See Forsyth, 12, *et seq.*; Dicey, Law of the Const., 51, note.

(f) In some instances this rule has increased the powers of the executive—has invested the executive officers with a wide discretionary authority—simply because the foreign law in force in such colony recognized the existence of such wide discretion in executive government; see Reg. v. Picton, 30 St. Tr. 225; Forsyth, 87.

(g) See Chap. V., *ante*.

(h) See Chap. VIII., *post*.



of the Crown as a constituent branch of the legislature, alter and mould the *lex prerogativa* as to the colony, to as full an extent as the British parliament can alter and mould it as to the United Kingdom (*i*). Thereafter the exercise by the Crown, or any officer of the Crown of any prerogative right recognised by the law of England, would be in the colony illegal, unless it were also a prerogative right *by the law of the colony*; and that would, of course, depend on the will of the colonial legislature as to all matters confided to its authority. The proclamation which followed the Treaty of Paris, made provision (*j*) for the calling together in Canada, Grenada, and East and West Florida, of "general assemblies," empowered "to make, constitute, and ordain laws. . . for the public peace, welfare, and good government of our said colonies and of the people and inhabitants thereof"; and Lord Mansfield held (*k*), that the effect of this was to prevent the Crown from thereafter exercising legislative authority within the colony. The act of legislative authority questioned in that case, was the imposition by Imperial Order in Council, of an export tax on certain commodities, which strikes one as an act of executive government rather than of legislation; but however that may be viewed, the reason given for the decision was, that the Crown, (*i.e.*, the executive authority of England), was irrevocably pledged "that the subordinate (*l*) legislation over the island should be exercised by an Assembly, with the consent of the Governor in Council, in like manner as in the other provinces under the King," and settlers were guaranteed a government by, and according to the laws made by such subordinate assembly. To the

(*i*) Chitty, p. 37.

(*j*) Perhaps we should say that it announced that provision had been made, in the commissions to the governors of those provinces, for, etc. See *ante*, p. 34.

(*k*) *Campbell v. Hall*, Cowp. 204; see *Phillips v. Eyre*, L. R. 6 Q. B. at p. 19.

(*l*) *i.e.*, subordinate to the Imperial Parliament.

like effect is the comparatively recent decision (*m*) of the Judicial Committee of the Privy Council, that "after a colony or settlement has received legislative institutions, the Crown (subject to the special provision of any Act of parliament (*n*)), stands in the same relation to that colony or settlement as it does to the United Kingdom." The decision in this last case was that the Crown has no power to constitute, by letters patent, a bishopric or appoint a bishop, (with ecclesiastical jurisdiction) in a colony possessed of an independent legislature. And in a still later case (*o*) the Judicial Committee of the Privy Council held that the Crown is bound by colonial legislation and in Quebec is entitled to no priority over other creditors because "the subject of priorities is exhaustively dealt with by them"—i. e. by the Codes passed by the parliament of (old) Canada, and continued in force in Quebec by the B. N. A. Act, s. 129,—"*so that the Crown can claim no priority except what is allowed by them.*"

The legislatures existing in Canada, both Dominion and provincial, are statutory—i.e., they exist under the authority of the B. N. A. Act—with the exception, to a partial extent, of the legislatures of New Brunswick and Nova Scotia, whose sphere of local authority is alone statutory; and this fact, of course, makes the argument *a fortiori* in the case of Canada. Certainly no act of the executive in England can be upheld against the provisions of an Imperial statute. The powers of our Canadian parliaments have been again and again declared to be, within their sphere, plenary powers of legislation. It is unnecessary to labor further upon this point, for a glance through our statute books will disclose that our colonial parliaments have legislated with regard to the exercise of the vast majority of the prerogatives of the Crown down to the smallest

(*m*) *In re* Lord Bishop of Natal, 3 Moo. P. C. (N. S.) 115.

(*n*) i.e., of the Imperial Parliament.

(*o*) *Exchange Bank v. Reg.*, 11 App. Cas. 157.

detail, and the discretionary power of the executive is reduced to a minimum, as in the United Kingdom. It may, however, be again remarked that now that executive responsibility to parliament, and through parliament to the electorate, is so thoroughly recognized, and the "conventions" of the constitution which ensure such responsibility, so universally observed, the tendency of legislation is to increase the amount of discretion allowed to the executive officers in the various departments of the public service; but this is not a matter of prerogative (a common law right) but a statutory discretion.

A rule frequently laid down in the authorities that a statute is not to be construed to deprive the Crown of any prerogative right unless the intention so to do is expressed in explicit terms, or arises by irresistible inference (*p*) should, perhaps, be here adverted to. It applies to colonial legislation (*q*) as well as to Imperial, and the case of *Exchange Bank v. Reg.* (*r*) is a good illustration of the "irresistible inference" which arises in cases where a statute purports to be exhaustive legislation in reference to a particular subject matter; in which case the Crown is limited to the rights and privileges (if any) conferred by the statute. Applying this to the B. N. A. Act, it appears that the executive government of Canada is to be carried on by the Governor-General (*s*) and the executive government of the several provinces by the respective Lieutenant-Governors thereof (*t*), and that the Act taken as a whole "makes an elaborate distribution of the whole field of legislative authority" (*u*); and it follows irresistibly that the prerogatives of the Crown, so far as they are exerciseable in Canada,

(*p*) Maxwell "On the Interpretation of Statutes," p. 161. And see, as to appeals from the colonies to her Majesty in her Privy Council, *Reg. v. Bertrand*, L. R. 1 P. C. 520.

(*q*) See *Maritime Bank v. Reg.*, 17 S. C. R. 657, (affirmed in P. C.—see note (*y*) p. 144 *post*) and the "Interpretation Acts" of the Dominion, and the various provinces, of Canada.

(*r*) *Ante*, p. 141. (*s*) Sec. 10; and see notes to sec. 9. (*t*) Sec. 62.

(*u*) *Bank of Toronto v. Lambe*, 12 App. Cas. at p. 587.

or in any province thereof, must be exercised—in her Majesty's name (*v*)—by the officer who by the B. N. A. Act is entrusted with “the carrying on of government,” and cannot be exercised by the Queen—*i.e.*, through the Imperial authorities—except in matters over which none of our legislatures have legislative power.

We shall have occasion to refer with considerable frequency to the limitations upon colonial legislative power arising from the colonial *status*, and it is to be observed that the prerogatives of the Crown relating to “Foreign Affairs” (*w*), including some as to military matters, have not been placed within colonial legislative power, but are under the control of the Imperial parliament for the reasons (which indeed are obvious) indicated in an earlier chapter (*x*). But we again repeat—if happily repetition may in this instance emphasize the principle which appears to us so important—that in every case the power which makes the law upon any given subject-matter, must

(*v*) B. N. A. Act, sec. 9 and notes thereto, *post*.

(*w*) See note, *ante*, p. 135.

(*x*) And see notes to sec. 9 of the B. N. A. Act, *post*. The prerogatives vested in the Crown as the *Fountain of Honor* are looked upon as (so to speak) prerogatives at large and not connected with any particular department of executive government. The dispute as to the position of provincial Q.C.'s would seem to narrow itself down to the question, whether the appointment is one connected with the administration of justice, or simply an honorary title. If the former, then both the Dominion and Provincial executives would appear to have the power—each in relation to the courts of Dominion or Provincial creation, as the case might be. If the latter, then neither would appear to have it, any more than either could make a man a knight. If there were no “boundless crop of venerable learning” to prejudice one's judgment, and if members of the bar are really officers of the courts, it would seem reasonably clear that the prerogative is one relating to the organization of courts, as to which both governments have powers conferred upon them by the B. N. A. Act. See *post*, Chap. XI. In *Reg. v. Amer*, 42 U. C. Q. B. 391, the power to issue commissions of Oyer and Terminer seems to have been treated as a prerogative at large; but it is submitted there are none such in relation to our self-government; certainly none are conferred on the Governor-General by his commission.



according to English law be the power which controls the execution of that law in every detail. We have tried to make this clear as to the colonies, and where those colonies have what has been termed a "unitarian" form of government the rule would seem to be recognized by judicial decision, and the universal practice of the legislatures of such "unitarian" colonies. A clear appreciation of the principle will make it apparent that it applies to the different governments of Canada; and that when we find the legislature of the Dominion empowered to make laws upon any given subject matter, any prerogative right capable of exercise in relation to such matter, must, and can only be exercised by the executive of the Dominion, and so of each of the Provincial governments (*y*). The division of the field of government between the Dominion and the provinces is therefore a division along the line of subject matters, and the whole power of government, legislative and executive, in relation to any given subject matter, rests in that government to which it is assigned for legislative purposes.

(*y*) See *per* Burton, J.A., in *Attorney-General (Can.) v. Attorney-General (Ont.)*, 19 O. A. R. at p. 38. Since the above was written, the report of the judgment of the Judicial Committee of the Privy Council in *Liquidators of Maritime Bank v. Receiver General of New Brunswick* has appeared. It affirms the text. See *Times Law Reports*, 6 July, 1892. We shall have occasion to refer to it again.

## CHAPTER VII.

### EXECUTIVE CHECKS ON COLONIAL LEGISLATION.

The position of the crown as a branch of the Imperial parliament, and the reason therefor, is very clearly expressed in a work to which frequent reference was made in the last chapter (*a*):

“ The king is, therefore, very properly a constituent part of parliament, in which capacity he possesses the means of preserving inviolate his rights and prerogatives as supreme executive magistrate, by withholding his assent at pleasure, and without stating any reason, to the enactment of provisions tending to their prejudice (*b*). It is however *only for the purpose of protecting the royal executive authority*, that the constitution has assigned to the king a share in legislation; this purpose is sufficiently insured by placing in the crown, the negative power of rejecting suggested laws. The royal legislative right is not of the deliberative kind; the crown has no power to propound laws. . . . Important therefore as this prerogative of rejection is as a shield against rebellious encroachments, as a preservative of the royal executive functions, it is in other points of view of a limited and negative nature.”

We have already (*c*) quoted from the commission to Governor Cornwallis, of Nova Scotia, the clause which so frankly states the same reason for the negative voice given

(*a*) Chitty, “ On the Prerogatives of the Crown,” p. 3.

(*b*) See Chap. VI.

(*c*) *Ante*, p. 33.

to the early governors. It must be borne in mind, however, that in those days the "literary theory" prevailed, which assigned to the legislative and executive departments of government, not only distinct but independent powers. With the growth in England and the colonies, of the principle of responsible government—through the medium of an executive responsible, through parliament, to the electorate—the negative voice allowed to the governor of a colony very largely ceased to find utterance in preservation of prerogative, and came to be employed as the up-holder, rather, of the supremacy of the Imperial parliament. And so with reference to the second negative allowed by the common law to the occupant of the throne, over all acts of subordinate legislative bodies throughout the Empire (*d*); that second negative came to be exercised subject to the "conventions of the constitution" which limit the interference of the Home government with colonial legislation, to interference in relation to matters of Imperial concern—to securing unity of national purpose and method throughout the various parts of a world-wide Empire. In other words, the true federal idea—the reconciliation of national unity with local self-government (*e*)—dominates this phase of our relationship to the mother country, just as it now determines the extent to which the British parliament shall legislate, as an *Imperial* parliament, for the colonial portions of the Empire. This is the conventional aspect. What is the legal position?

In former chapters the paramount legislative authority of the Imperial parliament has been pointed out, and the necessity for a careful distinction between its unlimited extent, legally speaking, and its limited operation, "conventionally" considered, insisted upon. And, just as we may have laws enacted for us by an authority entirely external, so we may have the deliberate utterances of what we

(*d*) See Chitty, at p. 25—passage quoted *ante*, p. 138.

(*e*) See *ante*, p. 8.

may call the two colonial branches of our Canadian parliament—bills which have passed both Commons and Senate—denied legal operation as Acts of parliament, by the refusal of Her Majesty's representative to assent thereto in her name.

By express provision of the B. N. A. Act (*f*), the Queen is a constituent branch of the parliament of Canada, and Her assent is necessary before a bill can become law. Her representative, the Governor-General of Canada, may refuse such assent; or he may reserve the bill for the consideration of the Queen in Council (that is to say, of the Imperial government), and upon such consideration, assent may be withheld: or, the Governor-General having assented and the bill having passed into Act of parliament, it may, within two years from its receipt by the Secretary of State in England, be disallowed, and "such disallowance . . . . being signified by the Governor-General . . . . shall annul the Act from and after the day of such signification." Now, it matters not what may be the reasons, assigned or unassigned, for withholding the Queen's assent to a bill, or for disallowing an Act of the Canadian parliament: the effect is, that in the former case, the bill is as if it never had been; in the latter, it is repealed by the Imperial government.

To deal with the different phases of this subject, more in detail, we quote first, section 55 of the B. N. A. Act:

"Where a bill passed by the houses of the parliament is presented to the Governor-General for the Queen's assent, he shall declare according to his discretion, but subject to the provisions of this Act and to her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure."

(*f*) Sec. 17; and see also sec. 2. The Crown is also a constituent branch of the provincial legislative assemblies—see notes to secs. 58 and 69, *post*.



The exercise by the Governor-General of this discretionary power cannot be legally questioned. Doubt having been expressed as to the legal efficacy of colonial enactments when assented to by a Governor, contrary to his instructions, that doubt was set at rest by the Colonial Laws Validity Act, 1865, the fourth section of which enacts:

"No colonial law, passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be, or be deemed to have been, void or inoperative by reason only of any instructions with reference to such law, or the subject thereof, which may have been given to such governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such Governor to concur in passing, or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent, or last mentioned instrument."

So, therefore, while the assent of the Governor-General in the Queen's name, or—in the case of a reserved bill—his signification of the Queen's assent, is absolutely essential to the validity of all Acts of the parliament of Canada, that assent once given to any Act, such Act (if within the legislative competence of parliament) becomes law, subject only to the power of disallowance by the Queen in Council.

This power is recognized, and the mode of its exercise defined by the 56th section of the B. N. A. Act:

"Where the Governor-General assents to a bill in the Queen's name, he shall, by the first convenient opportunity, send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council, within two years after receipt thereof by the Secretary of State, thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the houses of the parliament, or by proclamation, shall annul the Act from and after the day of such signification."

In this section it is material to note the limitation of the time within which the disallowance must take place. At common law, no such time limit existed, and this is one of those instances (to which reference was made in the last chapter) of the conversion of a common law prerogative into a statutory power. The two years being allowed to pass, without such disallowance by order in council—for that is the method prescribed—the executive department of the Imperial government can no longer interfere with the operation of the Act; nothing short of “repugnant” Imperial legislation can weaken its validity.

The Governor-General, however, as has been noticed, may, in the case of any bill presented to him, exercise his discretion, by neither giving nor withholding the assent of the Crown thereto; a third course is expressly allowed him; namely, to reserve the bill for the signification of the Queen's pleasure (*g*); and by section 57 of the B. N. A. Act, it is enacted:

“A bill reserved for the signification of the Queen's pleasure shall not have any force ~~unless and~~ until within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General signifies by speech or message to each of the houses of the parliament, or by proclamation, that it has received the assent of the Queen in council . . . .”

As we are now dealing with questions which arise out of our colonial relation to Great Britain, it is perhaps better to defer consideration of the power of the Lieutenant-Governor of a province, to withhold the Queen's assent from bills passed by the legislative assembly of his province, and of the power of the Governor-General (in Council) to disallow Acts of the provincial legislative assemblies, until we come to discuss the Canadian constitution in its internal aspect (*h*).

(*g*) Sec. 55.

(*h*) See next chapter, where will also be found some further observations on the “conventional” limits set to the exercise of the Imperial power of disallowance.

## CHAPTER VIII.

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### THE CONNECTING LINK—THE GOVERNOR-GENERAL (*a*).

In popular phraseology, the Governor-General is the "Queen's representative" in Canada, and in the popular mind there is an idea, vague no doubt, but still deeply ingrained, that he is clothed with large and vice-regal attributes, standing to us in much the same position as her Majesty occupies towards her subjects within the borders of the United Kingdom. But to the constitutional lawyer, learned in the Dryasdust precedents (as Carlylean laymen would doubtless term them) which define the legal position of a Colonial Governor, he appears in the light of an officer clothed with an authority strictly limited (*b*), whose every act as governor must be legally justified (*c*) by the terms of her Majesty's commission appointing him to fill the office, and whose capacity as representative is not general, but

(*a*) See Broom, "Const. Law," p. 622, *et seq.*; Forsyth, p. 84 *et seq.*; Todd, "Parl. Gov. in Brit. Col." It would appear that Mr. Todd's work was written in order to inculcate a proper appreciation of the importance of the office; see p. 584 of his book. See also Art. in Law Mag. for Nov., 1861 (Vol. 12), at p. 182, *et seq.*, quoting with approval the language of "a very able colonial lawyer"—A. Stuart, advocate, Montreal—in a work published in 1832, "On the functions and duties of the governor of a British province."

(*b*) Cameron v. Kyte, 3 Knapp, P. C. 332; Hill v. Bigge, 3 Moo. P. C. 465; Musgrave v. Pulido, L. R. 5 App. Cas. 102.

(*c*) Oliver v. Bentinck, 3 Taunt. 460; Raphael v. Verelst 2 W. Black. 1050; and cases in last note.

special,—in principle not more general, and not less special, than that of the most unlettered Dogberry on the magisterial bench of a back township (*d*), the powers, authorities, and functions of each appearing in, and being limited by, the terms of their respective commissions.

A word of caution should perhaps be written at this stage of our inquiry. In order that the reader may not be led to underrate the importance,—from a political standpoint—of a governor's position, and the varied and responsible duties which are put upon him by her Majesty's commission (*e*), it may be again observed that we are now looking at his position from the standpoint of the lawyer, and not that of the statesman. In some respects it may indeed be said that the law recognizes as legally effective, various acts of a governor, which constitutional usage would emphatically condemn, and the doing of which would afford ample ground for his recall; while on the other hand, a governor may by one and the same act incur civil or even criminal liability, and win the approbation of his Imperial superiors. We cannot too rigorously insist on the distinction frequently pointed out in the foregoing pages, between the *legal* and the *conventional*, under the British system of government. We shall have occasion to refer more at length hereafter, to the limits within which the legal powers of a governor should find scope for "conventional" exercise; but, as was pointed out in reference to the exercise by the Imperial parliament of its legal power to enact laws for a colony, a proper recognition of the legal position will greatly tend to strengthen colonial statesmen in their insistence upon the "conventional" limits being accurately defined and observed.

(*d*) Finlayson, "Review of the Authorities as to Repression of Riot," 110. Compare with this the language of Taschereau, J. (in reference to the position of a Lieut.-Governor)—*The Queen v. Bank of Nova Scotia*, 11 S. C. R. at p. 24.

(*e*) That commission refers to the B. N. A. Act, under which (see sec. 10) he is described as an executive officer "carrying on the government of Canada."



In the early days of colonial history, there seems to have been a disposition on the part of governors appointed to distant portions of the Empire, to set themselves above the law (*f*), and to insist upon the applicability to their case of the maxim, "The King can do no wrong." As in England, the Sovereign cannot be arrested by virtue of any legal process, or be impleaded in any court of justice in reference to any act, public or private (*g*)—so these early colonial governors, claiming a delegated sovereignty, attributed to themselves a corresponding sacredness of person, and an equal immunity from the jurisdiction of courts of justice. It is a very interesting study to trace the course of the decisions by which the attributes with which they had in fancy clothed themselves, were one by one stripped from them, until now their position, as legally recognized, is as above stated. It would appear from the earlier authorities, that the pretensions of the early governors to the immunities of a delegated sovereignty, were not paraded out of the territorial limits of their colonial government, and when proceeded against *in England*, they defended themselves by pleas in bar, and not in abatement—by defences on the merits, justifying their acts under their commissions, and not denying the jurisdiction of the English courts to entertain suits brought against them (*h*). And, when, in 1773, Governor Mostyn did allege, as a plea to the jurisdiction of an English court, that the acts complained of in the action, were done by him as

(*f*) See preamble to 11 & 12 Wm. III. c. 12, cited *post*.

(*g*) Steph. Comm. Vol. II. 498; Chitty, "Prerog. of the Crown," 374.

(*h*) In *Fabrigas v. Mostyn*, 1 Sm. Ldg. Cas. (8th. ed.) 652, Lord Mansfield cites three instances of actions brought *in England* against governors in respect of acts done in the Colony, during their term of office, in none of which, so far as appears, was there any plea to the jurisdiction—Lord Bellamont's case, 2 Salk. 625; *Comyn v. Sabine* (not elsewhere reported); and a third case mentioned by Powell, J., in *Way v. Yally*, 6 Mod. 194.

Governor of Minorca, Lord Mansfield thus disposes of the plea (i):

“The two grounds which are enforced to-day, are, if I take them right, first, that the defendant was governor of Minorca, and therefore for no injury whatsoever that is done by him, right or wrong, can any evidence be heard, and that no action can lie against him; secondly, that the injury was done out of the realm. I think these are the whole amount of the questions that have been laid before the court. Now as to the first, there is nothing so clear as that, in an action of this kind, which is for an assault and false imprisonment, the defendant, if he has any justification, must plead it; and there is nothing more clear than that if the court has not a general jurisdiction of the matter, he must plead to that jurisdiction, and he cannot take advantage of it upon the general issue.

“The point that I shall begin with, is the sacredness of the person of the Governor. Why, if that was true, and if the law was so, he must plead it. This is an action of false imprisonment; *prima facie*, the court has jurisdiction. If he was guilty of the fact, he must show a special matter that he did this by a proper authority. What is his proper authority? The King’s commission to make him governor. Why, then, he certainly must plead it; but, however, I will not rest the answer upon that. It has been singled out that in a colony that is beyond the seas, but part of the dominions of the Crown of England, though actions would lie for injuries committed by other persons, yet it shall not lie against the governor. Now I say for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor. In every plea to the jurisdiction, you must state a jurisdiction; for if there is no other method of trial, that alone will give the King’s Courts jurisdiction. Now in this case no other jurisdiction is shown, even by way of argument; and it is most certain that if the King’s courts cannot hold plea in such a case, there is no other court upon earth that can do it; for it is truly said that a gover-

(i) *Fabrigas v. Mostyn*, Cowp. 161. It will be noticed that the C.J. animadverted upon the indefinite nature of the plea in this case, but treats it as a plea to the jurisdiction.

nor is in the nature of a Viceroy (*j*), and of necessity part of the privileges of the King are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him, because what would the consequence be? Why, if a civil action lies against him, and a judgment is obtained for damages, he might be taken up and put in prison on a *capias*. And therefore locally during the time of his government, the courts in the island cannot hold plea against him. If he is out of the government, he leaves it; he comes and lives in England, and he has no effects there to be attached; then there is no remedy whatsoever if it is not in the King's Courts. . . . There may be some cases arising abroad, which may not be fit to be tried here, but that cannot be the case of a governor injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission. And therefore in every light in which I see this matter, it holds emphatically in the case of a governor if it did not hold with respect to any other man within the colony, province, or garrison. But to make question upon matters of settled law, where there have been a number of actions determined which it never entered into man's head to dispute—to lay down in an English court of justice such monstrous propositions as that a governor acting by virtue of letters patent, under the Great Seal, can do what he pleases; that he is accountable only to God and his own conscience,—and to maintain here that every governor in every place, can act absolutely; that he may spoil, plunder, affect their bodies and their liberty, and is accountable to nobody—is a doctrine not to be maintained. . . . How can the argument be supported that in an Empire so extended as this, every governor in every colony, and every province belonging to the Crown of Great Britain, shall be absolutely despotic, and can no more be called in question than the King of France? And this after there have been multitudes of actions in all our memories against governors, and nobody has been ingenious enough to whisper them that they were not amenable."

From that day to the present, no plea *to the jurisdiction* has ever again been raised to an action brought in England,

(j) This proposition is untenable; see *post*.

and many governors have been mulcted in damages by English juries, for acts done within the limits of their colonial governments (*k*).

It will be noticed however that in his celebrated judgment in *Fabrigas v. Mostyn*, Lord Mansfield lent the weight of his high authority to certain propositions, which if correct, would on the one hand largely increase the powers, and on the other hand largely lessen the liability of a governor—both propositions however being really dependant upon the first. Adopting the proposition that a Governor is a “Viceroy” *with a certain measure of delegated sovereignty*, he draws from it the further proposition (not necessary for the decision of the case) (*l*), that he is not amenable, civilly or criminally, to the courts of the colony over which he presides, during the term of his government. Practically considered, the position of parties having claims upon the governor, would in this view be one of much hardship, and in many cases would work a complete denial of justice. So no doubt Lord Aylmer’s house-keeper thought, when the Court of King’s Bench in Lower Canada, adopting Lord Mansfield’s dictum, declined to entertain her action for wages due from His Excellency (*m*).

It is now however clearly settled that a governor is liable to civil action in the courts of the colony over which he presides, not merely (*l*) in respect of claims upon contracts entered into, and torts committed by him in his

(*k*) *Wall v. MacNamara*, 1 T. R. 536; *Wilkins v. Despard*, 5 T. R. 112; *Glynn v. Houston*, 2 M. & G. 337; *Oliver v. Bentinck*, 3 Taunt. 456; *Wyatt v. Gore*, Holt N. P. 299 (defendant was Lieut.-Gov. of Upper Canada, and had to pay £300 for libelling plaintiff in the colony). It is to be observed that the commissions of some of these Governors conferred *military* authority, and the first three cases were in respect of military excesses, but the principle of the cases is throughout the same. See too *Phillips v. Eyre*, L. R. 4 Q. B. 225; 6 Q. B. 1.

(*l*) See *Hill v. Bigge*, 3 Moo. P. C. 465.

(*m*) *Harvey v. Lord Aylmer*, 1 Stuart 542.



private capacity, but also (2) in respect of any claim against him for acts done in the supposed exercise of his powers as governor. Of the former class, we may instance the case of the Governor of Trinidad, who was informed by the Judicial Committee of her Majesty's Privy Council (on appeal from the colonial court) that he must submit to the indignity of defending an action brought in the court of his own colony by certain vindictive jewellers whose bill he had omitted to pay before leaving England (*n*). Since that time the proposition may be considered settled, that for a cause of action wholly unconnected with his official capacity, the governor of a colony may be sued in the courts of that colony.

"They who maintain the exemption of any person from the law by which all the King's subjects are bound, or what is the same thing, from the jurisdiction of the courts which administer that law to all besides, are bound to show some reason or authority leaving no doubt upon the point. The reference to analogies, or the supposition of inconvenient consequences, must be much more pregnant than any that can be urged in this case, to support or even to countenance such a claim. If it be said that the governor of a colony is *quasi* sovereign, the answer is that he does not even represent the sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him."—*Per* Lord Brougham in *Hill v. Bigge*.

And speaking of *Fabrigas v. Mostyn*, Lord Brougham says :

"It is only a decision that he was liable to be sued in England for personal wrongs done by him, while Governor of Minorca. Nor does the decision thus given, rest upon any doctrine denying his liability to be sued in the island. There is no doubt a dictum of Lord Mansfield's in giving the judgment—'that the governor is in the nature of a viceroy, and that therefore locally during his government, no civil or criminal action

(*n*) *Hill v. Bigge*, 3 Moo. P. C. 465.

will lie against him.' And the reason and the only reason given for this position is, because upon process he would be subject to imprisonment. With the most profound respect for the authority of that illustrious judge, it must be observed that as has been shown, the governor being liable to process during his government would not of any necessity follow from his being liable to action, and that the same argument might be used to show that an action lies not against persons enjoying undoubted freedom from arrest by reason of privilege. But the decision in the case does not rest on this dictum. . . . The consequences imagined to follow from holding the governors liable to action like their fellow-subjects, are incorrectly stated, and if true would not decide the question."

Since the decision in *Hill v. Bigge*, the notion that the governor of a colony is in the nature of a viceroy, may be considered as forever exploded. The extent of a governor's powers had previously been passed upon in the case of *Cameron v. Kyte* (o), to which, it is true, the governor was not a party, but the governor's order in council being set up as a defence to the action, its validity was—properly as the Judicial Committee of the Privy Council held—inquired into by the courts of the colony. In giving judgment, Parke, B., says:

"If a governor had by virtue of that appointment, the whole sovereignty of the colony delegated to him as a viceroy, and represented the king in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the sovereign himself, though such act might not be in conformity with the instructions which the governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the governor be an officer merely with a limited authority from the crown, his assumption

of an act of sovereign power, out of the limits of the power so given to him, would be finally void, and *the courts of the colony over which he presided could not give it any legal effect*. We think the office of governor is of the latter description, for no authority or dictum has been cited before us to show that a governor can be considered as having the delegation of the whole royal power in any colony, as between him and the subject, when it is not expressly given him by his commission. And we are not aware that any commission to colonial governors conveys such an extensive authority."

Finally—so far as concerns civil liability—the question of a governor's amenability to the courts of his colony *in respect of acts done by him in the supposed exercise of his powers as governor*, came before the Judicial Committee of the Privy Council, on an appeal (*p*) from the colonial court in which the action had been brought; and in the judgment of the Committee, the authorities are reviewed and a clear decision reached, that the colonial courts have as complete jurisdiction to entertain an action against a governor as against any other inhabitant of the colony. After reviewing the previous authorities, the judgment of the Committee proceeds as follows:

"It is apparent from these authorities that the governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that for acts of power done by a governor under and within the limits of his commission he is protected, because in doing them he is the servant of the crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the governor may assume to do them as governor, cannot be considered as done on behalf of the crown, nor to be in any sense, proper acts of state. When questions of this kind arise, it must necessarily be within the province of municipal courts to determine the true character of

the acts done by a governor, though it may be that when it is established that the particular act in question is really an act of state policy done under the authority of the crown, the defence is complete, and the courts can take no further cognizance of it."

From these authorities, therefore, we may draw the following conclusions:

1.—The powers, authorities and functions of colonial governors are such, and such only, as are contained expressly or impliedly in the *commission* under which the office is held by him (*q*): for any act done quâ governor and within his authority as such, he incurs no liability, either *ex contractu* (*r*) or in tort (*s*). as, Cithan

2.—For any act done in his private capacity, or done quâ governor, but beyond his powers as such, a colonial governor is amenable to the civil jurisdiction of Her Majesty's courts, to the same extent as any other individual; and no distinction can be drawn between the courts in England and the colonial courts in respect to their jurisdiction to entertain an action against a governor (*t*).

3.—To any action brought against him, he cannot plead a plea of personal privilege—of immunity from being impleaded—except as part of the larger plea that the acts complained of were done quâ governor and as "acts of State," in which case the only remedy of the party aggrieved is by petition of right against the crown (*u*).

4.—A governor must plead specially his justification: in other words, when a governor justifies any act as being within the powers vested in him by his commission, he

(*q*) *Cameron v. Kyte*, *Hill v. Bigge*, *Musgrave v. Pulido*, *ubi supra*.

(*r*) *Macbeath v. Haldimand*, 1 T. R. 172—unless, indeed, he pledges his personal credit.

(*s*) *Reg. v. Eyre*, L. R. 3 Q. B. 487, and the charge of Blackburn, J., in the same case, reported by Finlayson *sub. tit.*, "The proceedings in the Jamaica case"; *Comyn v. Sabine*, cited by Lord Mansfield in *Fabrigas v. Mostyn*, Cowp. 161.

(*t*) *Hill v. Bigge*, *Musgrave v. Pulido*, *ubi supra*.

(*u*) *Musgrave v. Pulido*, *supra*.



must plead the commission, his powers thereunder, and show by proper averments that the acts complained of were done in the proper exercise of those powers (*v*).

We have hitherto considered the position of a governor in respect to his liability to civil action; how stands the law as to his criminal liability for crimes committed by him while governor? Lord Mansfield's dictum, it will be seen, lays down his immunity from criminal prosecution as well as from civil suit in the courts of the colony, but the very same course of reasoning which resulted in the decisions in *Hill v. Bigge*, and *Musgrave v. Pulido*, would seem equally to lead to the conclusion that a governor is amenable criminally to the courts of the colony, for crimes committed in the colony, whether such crimes are connected with his official position or entirely aside from it.

Let us consider this question a little more fully. The preamble to the statute 11 & 12 Will. III. c. 12—"An Act to punish governors of plantations, in this Kingdom, for crimes by them committed in the plantations"—characterizes the governors of those days as "not deeming themselves punishable for the same here (*w*), nor accountable for such their crimes and offences to any person within their respective governments"; for remedy whereof, provision was made by the statute for the trial of any offending governors *in England*. This statute was extended so as to apply to other persons holding colonial appointments, by 42 Geo. III. c. 85, and both statutes are to-day in force. How far do they apply? And do they, so far as they do apply, negative the jurisdiction of the colonial courts? Apart from these statutes, and adopting the doctrine of *Hill v. Bigge*, and *Musgrave v. Pulido*, the jurisdiction of the colonial courts would seem beyond question, and it is submitted that these statutes are, so far as they do apply,

(*v*) *Oliver v. Bentinck*, 3 Taunt. 460; and cases cited *supra*, p. 150.

(*w*) Crimes being local, and triable and punishable locally. See *post*, Chap. IX.

cumulative and not exclusive. Owing to the rigid rules of the common law as to venue in criminal prosecutions, it required statutes to render legal the trial in one county of an offence committed in another; *a fortiori*, the trial in England of offences committed on or beyond seas (*x*). An early statute, 33 Henry VIII. c. 23, provided for the appointment of a special commission for the trial of persons charged with murder on or beyond the seas, and it was under this statute that Governor Wall was tried, condemned, and executed (*y*). A governor, therefore, once departed from his colony would be entirely free from danger, unless, indeed, he could be sent back to stand his trial. The more practical remedy, however, would seem to have been adopted, and under the statute of William III., the objection in respect to venue was taken away. The preamble, moreover, speaks of the governors as "deeming themselves not accountable" to the colonial courts, and the statute is in no sense declaratory that such is the law. So we conclude that even in those cases in which, under this statute, a governor may be tried in England for offences committed in the colony, he is equally amenable to the courts of the colony.

But these statutes have been held not to apply to felonies, and only to misconduct in office. Ellenborough, C.J., thus characterizes (*z*) the later statute:

"The object of this Act was in the same spirit with the Act of 11 & 12 William III., to protect His Majesty's subjects against the criminal and fraudulent acts committed by persons in public employment abroad, *in the exercise of their employments*; to reach a class of public servants which that statute did not reach and to place them *in pari delicto* with governors. It has no reference in spirit or letter to the commission of felonies. . . The reason of the thing, *a priori*, would lead us to conclude that

(*x*) See note to *Keighley v. Bell*, 4 F. & F. at p. 490, and *post*, Chap. IX.

(*y*) *Reg. v. Wall*, 28 St. Tr. 51; see Broom, "Const. Law," 652.

(*z*) *Reg. v. Shaw*, 5 M. & S. 403, the only reported authority on it.

the jurisdiction as to trial of felonies *should be restrained to the local courts.*"

Although the prisoner in that case was not a governor but a subordinate officer in the civil service, the reasoning would (in the light of the decisions as to a governor's civil liability) seem to lead to a clear conclusion that (the jurisdiction of the courts of a colony to try a governor for felonies committed within the colony, or misdemeanors, unconnected with his office, there committed, is beyond question. And for the reasons before given, it is submitted that there is like jurisdiction in respect of offences falling within the statute of William III.

It is beyond the province of this work to discuss the question, what is necessary to affix criminal character to acts of a governor done in the supposed exercise of his powers. We are merely interested in showing that the same criminal and civil liability exists in the case of a governor as in the case of any other officer of the crown acting under a limited authority, leaving the student who desires to pursue this subject further to consult writers who deal with this larger subject (a).

Having now pointed out that for the powers and duties of a colonial governor, we must look to the terms of his commission, we must follow the course indicated, and for the powers and duties of the Governor-General of Canada, look to the terms of the commission under which that office is held. We shall hereafter have to point out certain changes which have from time to time been made in the terms of the commission, but for our present purpose—an inquiry into the legal powers, as now existing, of the Governor-General—it will suffice to say that in 1878, Letters Patent under the Great Seal of the United King-

(a) Broom, "Const. Law," 649, *et seq.*, 656, *et seq.* It may be noted that the cases in which governors have been prosecuted, have involved the question of their liability as *military* officers—in command abroad—rather than as *civil* servants. The Letters Patent constituting the office of Governor-General of Canada convey no military powers. See *post*.

dom, were issued, and are still in force, "making effectual and permanent provision for the office of Governor-General" of Canada, providing for the appointment, from time to time, by Commission under the Sign Manual and Signet, "of the person who shall fill the said office," and enumerating the powers and duties which should devolve upon such person (b). He is authorized and commanded to do and execute in due manner all things that belong to his command and trust, according:

I. To the several powers and authorities granted or appointed him by virtue of:

- (a) The British North America Act, 1867.
- (b) The letters patent (now being recited).
- (c) His Commission.

II. To such instructions as may from time to time be given to him,

- (a) Under the Sign Manual and Signet.
- (b) By order of her Majesty's Privy Council.
- (c) Through one of the Secretaries of State.

III. To such laws as are, or shall hereafter be in force in Canada.

Now although in the last analysis, the powers of the Governor-General are derived from Imperial authority, it will nevertheless much facilitate our inquiry, if we divide these powers (as the Letters Patent practically divide them) namely, with reference to their *immediate* source, thus:

1. Powers conferred from without the Dominion—*i.e.*, by Imperial authority.
2. Powers conferred by Canadian enactments.

And with respect to this division we may say that the powers directly conferred by Imperial authority, are—with certain few exceptions, to be hereafter discussed—powers not requiring for their exercise, their legally-effective exercise, the concurrence of any other person or body; while,

(b) See the Letters Patent printed in Appendix.



as a rule (the exceptions to which must also be adverted to hereafter) the powers conferred by Canadian enactment require the concurrence of the Queen's Privy Council for Canada, in order to their effective exercise, or in other words can only be legally exercised by Order in Council. In considering these same powers from a "conventional" standpoint, an entirely different principle of division must be adopted, if indeed there is any division so far as regards their "conventional" exercise. Following then the line of division adopted, as likely to afford assistance in arriving at a correct view of the Governor-General's powers—from the standpoint of the legal efficacy of their exercise—we proceed to discuss shortly, the prerogative rights and powers with which the Governor-General is entrusted *by direct Imperial authority*.

We have already discussed the question of the extent to which the Crown's prerogative rights are exercisable in the colonial possessions of the Empire, but we may here again observe that those rights are in every portion of the Empire to be exercised according to law,—that by express words or necessary intendment, an Act of the Imperial parliament may either entirely take away from the Crown (*i.e.*, the executive) a prerogative right theretofore exercisable by and under the common law without the concurrence of parliament, or may fetter its exercise with any terms or conditions which parliament may deem necessary in the public interest,—and that a "confirmed" Act of a colonial legislature is equally effective to those ends so far as concerns the exercise of the prerogative right in the colony (*c*). It will be noticed that the language employed in the Letters Patent, constituting the office of Governor-General, recognizes the existence of legal limits to the exercise (even by the sovereign in person) of the prerogative rights therein mentioned. With this perhaps unnecessary caution we proceed to enumerate the prerogatives of the Crown, the

(c) See Chap. VI, *ante*, p. 139, *et seq.*

power to exercise which in Canada is *by direct Imperial* authority entrusted to the Governor-General.

I. BY THE LETTERS PATENT, constituting the office of Governor-General, he is authorized and empowered :

(a) "III. . . . To constitute and appoint in our name, and on our behalf, all such judges, commissioners, justices of the peace, and other necessary officers and ministers of our said Dominion, *as may be lawfully constituted or appointed by us.*

"IV. . . . *So far as we lawfully may*, upon sufficient cause to him appearing, to remove from his office or to suspend from the exercise of the same, any person exercising any office. . . . ."

The exercise of the prerogative right of the Crown (as the fountain of justice) in the appointment to and removal from office *in Canada*, is now—with the exception of this one office of Governor-General—entirely regulated by statutes (*d*), Imperial and Colonial, so that it will be necessary to relegate to a future stage the consideration of this branch of a governor's general powers.

(b) "V. . . . To exercise all powers, *lawfully belonging to us*, in respect of the summoning, proroguing or dissolving of the parliament of our said Dominion."

Of these powers in relation to the parliament of Canada, it may be observed that the exercise of the power of *summoning* has been the subject of legislative regulation (*e*); the other two—of *proroguing* and *dissolving*—exist as at common law. The "conventional" limitations are many, the legal right is absolute. For whatever reason, or with whatever want of reason, parliament is prorogued or dissolved, such prorogation or dissolution puts an end to the session, or the parliament, as the case may be; and the assembling of the members without new summons would

(*d*) See the opinion of Sir James Scarlett (Lord Abinger) and Sir N. C. Tindal (C.J., C.P.), on the power of the Crown to create the office of Master of the Rolls in Canada (1827)—Forsyth, 172.

(*e*) B. N. A. Act, 1867, ss. 20 and 33.

be but as the gathering of a mob, and their Acts but as waste paper.

## II.—BY HIS “INSTRUCTIONS” (*f*).

We need only draw attention to the 5th clause, making provision as to the exercise of the prerogative of *pardon*. The Governor-General is debarred from exercising this prerogative without first receiving the advice, in capital cases, of the Privy Council for Canada; in other cases, of one at least of his ministers; except in cases where the interests of the Empire, or of some country other than Canada might be directly affected; in which exceptional cases, the Governor-General shall “take those interests specially into his own personal consideration, in conjunction with such advice as aforesaid.” In other words, in those exceptional cases, he may disregard the advice offered (*g*): in all other cases he must follow it.

III. BY THE B. N. A. ACT, 1867, the Governor-General is entrusted with the following prerogatives, and the manner of their exercise is to some extent defined.

### A.—*Appointments to office.*

The vast majority of offices in connection with the government of Canada are filled by persons appointed, under statutory authority, by the Governor-General *in Council*; but there are still a few offices to which the Governor may legally make appointments without, or even contrary to, the advice of the Queen’s Privy Council for Canada, although, of course, the making of such appointments *mero ipsius motu*, would be a flagrant breach of “conventional” usage, a complete subversion of the right of local self-government, long since fully accorded to Canada. To give anything like a full enumeration of the

(*f*) *i.e.*, the general “instructions” which accompany the Letters Patent; see appendix.

(*g*) That is to say, he acts in such case as an Imperial officer, and is supposed to act upon Imperial considerations.

former class of offices would necessitate a survey of the entire Civil Service of Canada. But confining our attention to the B. N. A. Act, the only officer therein mentioned in whose appointment the Governor-General and the Privy Council must concur is the Lieutenant-Governor of a Province. Of his position when appointed much must be hereafter said (*h*), but as to the appointment itself it suffices now to say that it must be made by Order in Council (*i*).

Of the few officers whose appointment, under the B. N. A. Act, is in the hands of the Governor-General personally, the following is a complete list:

1. Members of the Queen's Privy Council for Canada.— B. N. A. Act, s. 11. In various Acts of the parliament of Canada, provisions are contained as to the appointment of the ministers (or other officers) who shall preside over the various departments of state (*j*); but in all, the appointment is left in the hands of the Governor-General personally. This is *ex necessitate*, in the case of a change in the entire administration, but the position is the same in every case—the appointment is, *legally considered*, the act of the Governor-General alone. But there may be, and usually are, members of the Privy Council who hold no portfolio,

(*h*) See notes to sec. 58, B. N. A. Act, *post*.

(*i*) See R. S. C. (1886) c. 19, as to the use of the Great Seal of Canada in the appointment to certain offices.

( <i>j</i> ) Minister of Justice—	R. S. C. c. 21, s. 1.
“ the Interior—	“ c. 22, s. 1.
“ Agriculture—	“ c. 24, s. 1.
“ Marine and Fisheries—	“ c. 25, s. 1.
Secretary of State—	“ c. 26, s. 1.
Minister of Finance—	“ c. 28, s. 2.
Auditor General—	“ c. 29, s. 21.
Minister of Customs—	“ c. 32, s. 3.
“ Inland Revenue—	“ c. 34, s. 2.
Post-Master General—	“ c. 35, s. 5.
Minister of Railways and Canals—	“ c. 37, s. 2.
“ Public Works—	“ c. 36, s. 3.
“ Militia and Defence—	“ c. 41, s. 4.

.. .. *Latour*



and it may be said, therefore, that the power of appointing members of the Privy Council, simply as such, is fettered by no statutory limitations.

2. Senators.—B. N. A. Act, s. 24.
3. Speaker of the Senate.—B. N. A. Act, s. 34.
4. Judges.—As enumerated in B. N. A. Act, s. 96.
5. Deputy Governor-General.—B. N. A. Act, s. 14, and Letters Patent, clause VI.

( B.—*The summoning of parliament.*

Reference has already (*k*) been made to the clause in the Letters Patent constituting the office of Governor-General of Canada, by which the person filling that office is empowered to exercise the prerogatives of the Crown in reference to the summoning, proroguing, and dissolving of parliament; and it has been pointed out that the only statutory regulation as to the exercise of this prerogative is in reference to the *summoning* of parliament. Treating the parliament of Canada as one body, the B. N. A. Act provides (*l*):

“There shall be a session of the parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the parliament in one session, and its first sitting in the next session.”

and there can be no doubt that a Governor-General who should disregard this imperative provision, even upon the advice of her Majesty's Privy Council for Canada—*i.e.*, his Ministers—would be guilty of a plain violation of his duty; and if it can be imagined that legal damage could be suffered by any individual by reason of such violation of duty, such individual would have a right of action in respect of such damage, in accordance with the principles heretofore laid down (*m*). The similar provision (*n*) necessitating annual sessions of the legislative assemblies

(*k*) *Ante*, p. 165.

(*l*) Sec. 20.

(*m*) *Ante*, p. 158, *et seq.*

(*n*) B. N. A. Act, sec. 83.

of the provinces of Ontario and Quebec, has, as we write, been disregarded by the Lieutenant-Governor of the latter province, but the bitterness there of contending factions is such that it is hardly possible to discuss this matter further now, without appearing to advocate a party's cause.

Treating now the parliament of Canada as composed of three branches—the Crown, the Senate, and the House of Commons (o)—attention must be drawn to the difference in the duration of the life of the respective branches. The Crown and the Senate are immortal branches, while the House of Commons might be more aptly termed the foliage of parliament, appearing and disappearing, sometimes in quick revolving seasons (as in the Antipodean Colonies), but, at the longest, in quinquennial recurrences (p). The analogy holds even more fully, for as a tree grows and does effective work only when clothed with foliage, so parliament requires for the effective exercise of its functions the magic call of gubernatorial spring, summoning the murmuring leaves of the Commons into legislative being!!!

Analogies aside, the result of this marked distinction in the constitution of the various branches of parliament is apparent in the B. N. A. Act, in the absence of any provision for the calling together of the members of the Senate, while it is expressly enacted :

“38.—The Governor-General shall from time to time in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons.”

This section however would seem to carry the governor's powers no further than the Letters Patent alone would have carried them, and therefore, as said by Dr. Bourinot : “The summoning, prorogation, and dissolution of parliament in Canada, are governed by English constitutional usage. Parliament can only be legally summoned by

authority of the Crown." After the expiry of the House of Commons by lapse of time or dissolution, there must be a new House elected by the people according to law, before there can be an effective exercise of the prerogative right to summon parliament; and we may here note that in connection with such election certain powers are vested in the Governor-General and certain duties imposed upon him by Canadian legislation, in the exercise of which he, in contemplation of law, acts personally. Upon him devolves the duty of fixing the date for the holding of such election—the rule is the same as to bye-elections—and by him the returning officer for each electoral district is appointed (*q*). This however by the way. The House of Commons being so elected, parliament can meet together for the despatch of business only upon the summons of the Governor-General. It is worthy of note that this word, "*summon*," is used in the B. N. A. Act, in reference to the appointment of senators (*r*), and that, as has been said, there is no legislative regulation of the method by which the Senate is called together for the despatch of business; while in relation to the House of Commons ~~the~~ the word is used to indicate the annual calling together of the elected members of the House for the exercise of their functions. As a matter of usage (in conformity with the English practice) the instrument by which the Governor-General summons the House of Commons, viz., a proclamation under the Great Seal, is addressed to both senators, and members of the House of Commons.

(C.—*The exercise of the prerogative rights of the Crown as a constituent branch of the Parliament of Canada.*

This matter has been fully dealt with in the last chapter, and we need not therefore dwell further upon it here.

(*q*) R. S. C. c. 8, s. 3.

(*r*) s. 24.

D.—*The disallowance of Provincial Acts.*

No prerogative right of the Crown is more firmly established than the right to supervise the legislative enactments of all minor legislative bodies—the right is indeed, but the logical result of the rule that the Crown is a constituent part of every legislative body throughout the Empire (s). Even should a Governor “thereunto lawfully authorized” assent in the Queen’s name to an Act of a colonial legislature, there is by the common law of England a reserved power in the Crown to repudiate the action of the Crown’s officer in the colony and to disallow such Act. In the case of Canada, the exercise of this prerogative must, to be legally effective, take place within two years after the receipt of the Act by the Secretary of State for the colonies (t); but the right once exercised in the method pointed out by the statute, and such exercise being duly “signified” here, the Act, so disallowed, is absolutely annulled “from and after the day of such signification.” It is to be noticed, however, that this power of disallowance cannot be legally exercised by the Queen personally, but only by and with the advice of her Privy Council.

With regard, however, to Acts of the legislative assemblies of the different provinces of the Dominion, the right to exercise this prerogative has been taken away from the Queen in Council, and is by the B. N. A. Act (u) conferred on the Governor in Council—a matter frequently adverted to, as indicating the very extended rights of self-government accorded to Canada. Much must be said hereafter with reference to this power, and the proper “conventional” limits within which it should be exercised; but viewing it from the standpoint of the legal efficacy of its exercise, it would appear clear that, the Governor-General and the

(s) Chitty, p. 25; see. Chap. VI. *ante*, p. 138; Théberge v. Landry, 2 App. Cas. 102; see notes to s. 69 B. N. A. Act, *post*.

(t) B. N. A. Act, s. 56.

(u) Sec. 90, read in connection with ss. 55, 56, and 57.



Privy Council concurring in such disallowance and exercising their power in the manner and within the time indicated in the statute, no provincial Act is legally exempt from the operation of this prerogative of disallowance.

This is, perhaps, the proper place to advert to a glaring error—glaring to us in Canada at least—into which Prof. Dicey has fallen in the work to which we have frequently referred (*v*)—a work which, in its elucidation of the principle of the *supremacy of law*, as the fundamental principle of Anglo-Saxon government the world over, stands to-day *facile princeps*; but which, in its references to the colonies generally and to Canada in particular, displays a strange lack of appreciation of the true position of affairs (*w*). To confine our attention, however, to this particular error—Prof. Dicey is completely astray in laying it down, that the lodging of this veto power in the hands of the Governor-General in Council—*i.e.*, with the Dominion Government,—was intended to obviate the necessity for resort to the courts, for the decision of “constitutional” cases involving the determination of the line of division between the sphere of authority of the Dominion parliament and that of a provincial assembly.

“The futility of a hope grounded on a misconception of the nature of federalism,” is a pretty strong expression, and contains a very direct charge that the Fathers of Confederation did not know what they were about in this matter. One who, like Prof. Dicey, speaks with authority, should not have penned such a grave charge without first consulting the debates which took place in the various legislatures upon the “Confederation Resolutions.” Had he done so, he would have found that a very sharp line of distinction was drawn between the exercise by the Dominion government, *as a matter of political expediency*, of the power of disallowance of provincial Acts, and the exercise by the courts

(*v*) “The Law of the Constitution.”

(*w*) See note at end of this chapter. And see Chap. I. *ante*.

of the *judicial function* of declaring an Act *ultra vires*. As expressed by the Chancellor of Ontario, in a recent case (x), the supervision, touching provincial legislation, entrusted to the Dominion government, works in the plane of political expediency as well as that of jural capacity, while the question for the courts is as to the latter merely. The framing of the Quebec Resolutions, upon which the B. N. A. Act is founded, was the work of the most eminent legal minds of that day in Canada; and a glance at the debates upon those Resolutions will show that they thoroughly appreciated the distinction, pointed out in these later days by the Chancellor. Throughout the debates, it was clearly recognized that the exercise by the Dominion government of the power of disallowance, was to be exercised in support of federal unity,—*e.g.*, to preserve the minorities in different parts of the confederated provinces, from oppression at the hands of the majorities. That it was not intended to obviate the necessity for resort to the courts, is apparent from the following extract. Complaint was made that while the Dominion government was invested with this *veto* power, no authority was provided to supervise its exercise; and the question was further asked, what check will there be upon Dominion legislation? The speaker (y) presumed, for the purpose of his argument, that (in each of these cases, the only check would be through the Imperial government.

“HON. ATTORNEY-GENERAL CARTIER.—The delegates understood the matter better than that. Neither the Imperial government nor the general government will interfere, but the courts of justice will decide all questions in relation to which there may be differences between the two powers.

“A VOICE.—The Commissioner's courts!

“HON. MR. DORION.—Undoubtedly. One magistrate will decide that the law passed by the federal legislature is not law,

(x) Atty.-Genl. (Can.) v. Atty.-Genl. (Ont.), 20 O. R. at p. 245.

(y) Hon. A. A. Dorion; afterwards Sir A. A. Dorion, Chief Justice of Quebec. See Confed. Deb. p. 690.

*eg. M.  
Scho*

whilst another will decide that it is law, and thus the difference, instead of being between the legislatures, will be between the several courts of justice.

"HON. ATTORNEY-GENERAL CARTIER.—Should the general legislature pass a law beyond the limits of its functions, it will be null and void, *pleno jure*.

"HON. MR. DORION.—Yes, I understand that; and it is doubtless to decide questions of this kind that it is proposed to establish federal courts."

The fact is that the power of disallowance vested in the Governor-General in Council, is precisely analogous to the power of disallowance vested in the Queen in Council over Dominion legislation. The power in each case is subject to the limitations prescribed by those "conventions of the constitution" to which Prof. Dicey so frequently refers. An act of the Dominion parliament may run the gauntlet of the home government, and yet be afterwards declared by the courts to be invalid. As is well known, the supervision exercised by the law officers of the Crown in England, is directed to seeing that any colonial Act, submitted for their consideration, is not repugnant to any Imperial legislation; and they do not pretend to examine Dominion Acts in order to determine the question of their validity, as being within the range of subject matters confided to the parliament of Canada by section 91 of the B. N. A. Act. And with regard to the disallowance by the governor in council of provincial Acts, the exercise of this power by reason of the provincial Act being thought *ultra vires*, has almost entirely ceased, and the supervision now works almost exclusively "in the plane of political expediency."

Note to p. 172 *ante*.—The first chapter of Prof. Dicey's book—"On the Nature of Parliamentary Sovereignty"—contains nothing which might not be, with equal truth, said of the legislative bodies throughout Canada. What he writes at p. 58 in disproof of "the alleged legal limitations on the legislative sovereignty of parliament,"—namely, limitations arising out of the precepts of the moral law, the prerogatives of the Crown, and the binding effect upon parliament of preceding Acts

of parliament—is all equally applicable to the position of Canadian legislatures. And with reference to them, too, it may be said, that there is no competing *legislative* power either in the Crown, in either branch of the legislature (where the legislature happens to be bicameral), in the constituencies, or in the law courts.

The second chapter “is to illustrate the characteristics of such sovereignty, by comparing the essential features of a sovereign parliament like that of England, with the traits that mark non-sovereign law-making bodies,”—among which he classes colonial legislatures. Yet, on a later page (105) he lays it down :

“When English statesmen gave parliamentary government to the colonies, they almost, as a matter of course, bestowed upon colonial legislatures, authority to deal with every law, *whether constitutional or not*, which affected the colony, subject, of course, to the proviso, rather implied than expressed, that this power should not be used in a way inconsistent with the supremacy of the British parliament. The colonial legislatures in short are, *within their own sphere*, copies of the Imperial parliament. They are, within their own sphere, *sovereign* bodies, but their freedom of action is controlled by their subordination to the parliament of the United Kingdom.”

To charge the men who had in hand the framing of the scheme of confederation, with “misconception of the nature of federalism” comes with rather bad grace from Prof. Dicey. He speaks (p. 133) of a federal state as “a political contrivance intended to reconcile national unity and power with the maintenance of ‘state rights.’” “The end aimed at,” he says, “fixes *the essential character* of federalism.” A very clear statement this; and yet, the Professor apparently fails to note that ‘state rights’ may be paraphrased and generalized as ‘local self-government,’ and that his definition of federalism is clearly applicable to those “conventions” of the British constitution which regulate the relations between Great Britain and her colonies. We might refer, too, to another passage in which he is historically inaccurate. He treats (page 144) the division of power between the legislative and executive departments of government, under the American system, and the restrictions, which appear in their “Constitution,” upon interference with *individual* rights, as being part and parcel of—“connected with”—the same federal idea of division. In this he is clearly astray. Several of the constitutions which existed in the individual states prior to the adoption of “the Constitution of the United States,” exhibit both these characteristics—the first, because that was thought to be the English principle, and the second, because of the prevalence then of the doctrines of Rousseau and Montesquieu. ✕



## CHAPTER IX. *206p.*

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### COLONIAL LEGISLATIVE POWER.

We have now pointed out that, in common with other British colonies, legislative power in Canada is subject to certain limitations, arising from the colonial relationship. Not only must the assent of the Crown as a constituent branch of the legislature be given (*a*); the Act so assented to must run the gauntlet of the Home Government (*a*); having done so, it may still, by judicial decision, be declared absolutely void and inoperative by reason, and to the extent, of its "repugnancy" to Imperial legislation having the force of law in Canada (*b*).

Much must be hereafter said in reference to the division, in Canada, of the subject matters proper for legislative action, between the parliament of Canada on the one hand, and the legislative assemblies of the respective provinces on the other; but for the purpose of the enquiry to which this chapter is to be devoted, this division of the field may be disregarded. We desire to treat of the power of legislation as a totality, and to ascertain what, if any, further bounds are set to that power in this British colony.

It may be argued that this question is settled by the Colonial Laws Validity Act, 1865 (*c*), and that as any colonial law is to be held inoperative to the extent of its

(a) See Chap. VII. *ante*, p. 147. (b) See Chap. IV. *ante*, p. 58, *et seq.*

(c) 28 & 29 Vic. c. 63 (Imp.).

repugnancy, *but not otherwise*, it impliedly follows that all colonial laws not open to the charge of repugnancy must be held operative, and that therefore the power of legislation is—subject only to the limitations already adverted to—as full as that of the Imperial parliament, and that colonial laws are equally obligatory on courts of justice. But a proposition formerly (d) laid down must not be overlooked; namely, that in the last analysis our rights, legally speaking, are held under Imperial grant, and to our right to legislate this proposition is particularly applicable. In other words, we must always refer to the colonial “Charter”—proclamation, commission, or Imperial Act—containing the grant of legislative power, to ascertain its extent; and beyond the limits therein laid down, the power cannot extend. For us, this Charter is the B. N. A. Act, and the terms of the grant are of the widest possible description (saving always Imperial sovereignty), and—subject to the division of the field between the Dominion and the provinces and subject always to the checks to which we have referred—the power of legislation is supreme in relation to all matters within the limits of colonial legislative power. This principle is fully recognized in the judgment of the Judicial Committee of the Privy Council in a case involving consideration of the position of the Legislature in India—*Queen v. Burah* (e). Lord Selborne, delivering the unanimous opinion of the Committee, referred to the judgment of the court below, as in effect treating the Indian Legislature as an agent or delegate, acting under a mandate from the Imperial parliament, and dissented from that judgment in the following forcible language:

“But their Lordships are of opinion that the doctrine of the majority of the court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial parliament which created it, and it can, of course, do

(d) Chap. IV. *ante*, p. 56.

(e) L. R. 3 App. Cas. 904.

nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would of course be included any act of the Imperial parliament at variance with it) it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions" (f).

In an earlier case in the Court of Queen's Bench, and afterwards, on appeal, in the Exchequer Chamber—the *cause célèbre* of Phillips v. Eyre (g)—the judges of those courts had to consider the position and powers of a colonial legislature, and the extent of the operation of colonial enactments. As a defence to the action, which was brought in England, for trespasses alleged to have been committed in Jamaica, the defendant, governor of the island, pleaded an Act of Indemnity passed by the Jamaica Legislative Assembly. The plea was demurred to, and the question was thus raised, (1) as to the power of the colonial assembly to pass an Act of Indemnity, and (2) as to the extra territorial operation of that Act. For the defendant it was argued that by the law of England the legislature of a colony is supreme within the boundary of the colony; that the courts in this country are bound to recognize the laws

(f) Compare the language of Marshall, C.J., in *McCulloch v. Maryland*, 4 Wheat. 421 (United States S. C. Rep.), quoted at p. 92 of the Mich. University Lectures of 1889, published *sub. tit.* "Const. Hist. as seen in American Law."

(g) L. R. 4 Q. B. 225; 6 Q. B. 1.

which the colonial legislature make as part of the English law; that the Crown may refuse its consent to a colonial Act; the Imperial parliament may interfere, and the laws which the colonial legislature make must not be "repugnant" to the law of England, as that word is explained in 28 & 29 Vic. c. 63; but, subject to those qualifications, the laws passed by the colonial legislature and made with reference to acts committed within their jurisdiction, are as binding as the laws of the Imperial parliament; that English courts recognize them, not through international courtesy, but because they must be taken to be part of the law of England (*h*); and that it may well be, that the colonial legislature have no power to take away a remedy from a British subject, but they may discharge a cause of action which has accrued within the limits of their territory.

In delivering the unanimous judgment of the Court of Queen's Bench, Chief Justice Cockburn says:

" . . . . It cannot be disputed that the Jamaica Legislature, having full legislative authority within the limits of the colony, subject only to the assent of the Crown, had full power to pass the statute in question, so far as to take away the right of action before the local tribunals . . . . but it is contended on the part of the plaintiff, that a right of action being given before the courts here, in respect of personal wrongs committed in a colony, this right cannot be taken away by an Act having no legislative effect beyond the limits of the local authority. . . . It may be useful to consider what would have been the effect if, instead of legislating *ex post facto*, the Legislature of Jamaica in anticipation of future events, had passed a statute authorizing the acts which have given rise to this action. We cannot doubt that in such a case, no right of action would arise here. . . . It remains to be seen how far this principle will apply where an act, admitted to have been unlawful when done, is legalized and divested of its tortious character, and immunity is afforded to the wrongdoer in respect

(*h*) See Redpath v. Allen, cited *post*.



of it, by *ex post facto* legislation. . . . We are, however, of opinion that the same principle which we have stated to be applicable to an act made lawful by former legislation, is equally applicable to an act originally wrongful, but legalized by an *ex post facto* law. Local Legislatures having been established in our colonies with plenary powers of legislation, the same comity which obtains between nations, should be extended to them by the tribunals of this country, when their law conflicts with ours, in respect of acts done within their jurisdiction. . . . Plenary power to make laws having been conferred on the local legislature, subject to the assent of the sovereign, it cannot be disputed that it was within its competence to pass the law referred to in the plea, and the only question is, whether the effect of it is to deprive the plaintiff of the right which he would otherwise have had, of maintaining an action in this country. For the reasons we have given, we are of opinion that such is its effect, and consequently that on the demurrer to the plea, our judgment must be for the defendant."

In the Exchequer Chamber (i), the court was again unanimous, and Mr. Justice Willes, in delivering the judgment of the seven judges of which the court was composed, says :

"It seems to be plainly within the competence of the legislature, which could have authorized by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon due consideration of the circumstances to adopt and ratify like acts when done, or in the language of the law under consideration, to enact that they shall be 'made and declared lawful and confirmed.' Such is the effect of the Act of Indemnity in question, which follows the example of similar legislation in the mother country, and the other dominions and colonies of the Crown. . . . The Crown has in numerous instances granted charters under which houses of assembly, and legislative councils, have been established for the government of colonies, whether conquered or settled; and such councils and assemblies have from time to time made laws suited to the 'emergencies

(i) L. R. 6 Q. B. 1. Counsel for the plaintiff referred to the B. N. A. Act as conferring *supreme* powers.

of the colony,' which, of course, include all measures necessary for the conservation of peace, order and allegiance therein. . . . subject to the approval of the Crown, and the control of the Imperial legislature. . . . We are satisfied that a confirmed Act of the local legislature lawfully constituted, whether in a settled or conquered colony, has as to matters within its competence, and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial parliament."

The subsequent passages in the judgment distinctly affirm that colonial legislation will be given effect to by English Courts on the same principle of comity as induces those courts to recognize foreign law.

The same views are expressed in the opinions of the judges of the Court of Appeal for Ontario in a case which came before them in 1872 (*j*). It may be observed that their remarks, although made in reference to an Act of the Legislative Assembly of Ontario, are—at least equally—applicable to legislation by the parliament of Canada upon subjects within its legislative competence. The question which arose for decision was as to the power of the Ontario legislature to pass an Act confirming and validating, as against infants, a deed of settlement made by trustees under a will, the contention being that such legislation had the effect of depriving one man of his property and giving it to another. Draper, C.J., uses very clear and emphatic language as to the right of the Local legislature to pass private Acts :

"As in England, it is a settled principle that the legislature is the supreme power, so in this province, I apprehend that within the limits marked out by the authority which gave us our present constitution, the legislature is the supreme power. It is on this principle that private Acts of parliament are upheld as common modes of assurance, being founded upon the actual or implied assent of those whose interests are affected. . . . I think nothing is to be gained by a theoretical distinction, which has been suggested, between the authority of the legislature to

pass laws upon certain subjects, and the right to exercise that power as they may deem fitting. Whether it be called a power or a right, it comes to the same thing; since though our legislature is limited by the Constitutional Act to certain defined subjects, the Act imposes no limit to the exercise of the power on those subjects. . . . If the new law be within the class of subjects committed to the provincial legislature, I know of no authority in provincial tribunals to refuse to give it effect, applying to its language the same rules of construction that are applicable to any other statute passed by competent authority."

The same question—and again in reference to the legislative power of a Provincial Assembly—came before the Judicial Committee of the Privy Council in the celebrated case of *Hodge v. The Queen* (*k*). The Committee very emphatically re-affirmed the doctrine laid down in *Queen v. Burah* (*l*), and held that the provincial legislature was within its powers, in entrusting to a Board of License Commissioners, authority to enact regulations in reference to taverns and billiard-rooms in connection therewith, and thereby to create offences and annex penalties. The question was thus disposed of :

It appears to their lordships, however, that the objection raised by the appellants, is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of, or acting under any mandate from the Imperial parliament. . . . The B. N. A. Act conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial parliament, but authority as plenary and as ample within the limits prescribed by section 92, as the Imperial parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area, the local legislature is supreme, and has the same authority as the Imperial parliament, or the parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It

(*k*) 9 App. Cas. 117.

(*l*) *ante*, p. 177.

is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details, and machinery to carry them out, might become oppressive or absolutely fail. . . . It was argued at the bar, that a legislature committing important regulations to agents or delegates, effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature and not for courts of law to decide."

In the still more recent case of Powell v. Apollo Candle Co. (m), the Judicial Committee of the Privy Council expressed their continued adherence to the opinions laid down in the earlier cases to which we have referred.

The power of the Dominion parliament to legislate for the peace, order, and good government of the North-West Territories (conferred by 34 & 35 Vic. c. 28, Imp.), was held to be the same plenary power of legislation as is possessed by the Imperial parliament (n).

Applying, then, the rule so clearly laid down by Lord Selborne in the earlier case (o), we have to look to those terms of the B. N. A. Act:

1. By which, affirmatively, the legislative powers are created.

2. By which, negatively, they are restricted; and we have to note that affirmatively the legislative power is of very wide range, namely, to "make laws in relation to" the various matters enumerated in the Act, and that of express negative restriction there is no sign within the four corners of the Act.

But as we are a Dominion "under the Crown of the United Kingdom" (p), there must be in any Canadian

(m) 10 App. Cas. 282.

(n) *Riel v. Reg.*; 10 App. Cas. 675; see *post*.

(o) *ante*, p. 178.

(p) See preamble to B. N. A. Act and notes thereto, *post*.



legislation a saving of the sovereignty of England. In the Quebec Resolutions, upon which the B. N. A. Act is founded, this restriction is express (*q*); but in the Act itself it was no doubt deemed unnecessary to insert any words of express restriction upon this point, as it is an implied restriction upon all colonial legislation (*r*). In a very early case (*s*), Chief Justice Vaughan, under the heading "What the parliament of Ireland cannot do," says:

1. It cannot alien itself, or any part of itself, from being under the dominion of England; nor change its subjection.

2. It cannot make itself not subject to the laws of and subordinate to the parliament of England (*t*).

3. It cannot change the law of having judgments there given, reversed for error in England; and others might be named (*u*).

4. It cannot dispose the Crown of Ireland to the King of England's second son, or any other but to the King of England.

And in a Canadian case it is laid down, that legislation inconsistent with its relation to the Empire of which it forms a part, would be "unconstitutional" and void (*v*).

The second and third propositions laid down by Chief Justice Vaughan, have been already discussed, with the exception of the question as to the prerogative right of the Crown to hear, in the Privy Council, appeals from Colonial judgments; this must be dealt with hereafter. Propositions 1 and 4 relate no doubt to extreme cases, which can hardly arise in this age, but there are many matters in respect to

(*q*) Resolution No. 29.

(*r*) Dicey 'Law of the Const.' 105.

(*s*) *Craw v. Ramsay*, Vaugh. 292. (*t*) See Chap. IV. *ante*.

(*u*) *i.e.*, it cannot legislate in reference to the prerogative right of the Crown to hear and determine appeals from colonial courts; or change a law of express colonial application.

(*v*) *International Bridge Co. v. Can. Southern Ry.*, 28 Grant, at p. 134; see also *Tully v. Principal Officers of H. M. Ordnance*, 5 U. C. Q. B. 6.

which we possess no legislative power because its exercise would be a usurpation of sovereignty in its international sense (*w*).

There is a further implied restriction upon our legislative power, viz., that by the very terms of the grant that power is *territorially* limited (*x*); and this branch of our subject is of so much importance that we must give it careful attention (*y*). It will help to a solution of our problem if we consider, first, the legislative powers,—territorially considered—of the Imperial parliament. That body is the authorized exponent of the will of the nation in its international sense, and so far as other nations are concerned, its enactments are of course inoperative beyond the borders of the Empire, including within those borders, the “floating islands” of the British navy and *mercantile marine* (*z*). In a work of recognized authority (*a*), certain canons of construction are laid down as applicable to Imperial statutes, which may be shortly stated. *Prima facie*, enactments of the parliament of the United Kingdom are operative only within the United Kingdom, and do not extend to the colonies (*b*), nor to British subjects (nor, *a fortiori*, to foreigners) out of the United Kingdom (*c*); unless there is the intention “clearly expressed or to be inferred either from its

(*w*) See B. N. A. Act, ss. 9 and 132.

(*x*) See 9 App. Cas. 117, passage quoted *ante*, p. 182.

(*y*) No text writer gives this matter more than a passing notice. See Dicey, “Law of the Const.” p. 97, note (3).

(*z*) Reg. v. Anderson, L. R. 1 C. C. R. 161; Reg. v. Carr, L. R. 10 Q. B. D. 76.

(*a*) Maxwell, “The Interpretation of Statutes,” Chap. VI.

(*b*) See Chap. IV. *ante*, p. 57, *et seq.*

(*c*) Arnold v. Arnold, 2 Myl. & Cr. at p. 270; Jeffreys v. Boosey, 4 H. L. Cas. 815; Cope v. Doherty, 2 DeG. & J. 614; *ex parte* Blain, L. R. 12 Chy. D. 522. Laws as to procedure in actions, including the limitation of a time within which proceedings are to be taken—*leges fori*—are of course binding on all litigants, subjects or foreigners; Lopez v. Burslem, 4 Moo. P. C. 405.

language or from the object or subject matter or history of the enactment" (*d*). The Colonial Laws Validity Act, 1865, gives the canon of construction in reference to Imperial enactments which are to be held to extend to a colony—there must be the "express words or necessary intendment" of the Act. But in any case, if the language of an Imperial Act of parliament, unambiguously and without reasonably admitting of any other meaning, applies to foreigners abroad, courts of justice, the Empire over, must obey and administer it as it stands, for they cannot question the authority of the Imperial parliament or assign any limits to its powers (*e*). The entire ground would seem to be covered by the language of Brett, J., in delivering judgment in a late English case (*f*):

"General words in a statute, have never, so far as I am aware, been interpreted so as to extend the action of the statute beyond the territorial authority of the legislature. All criminal statutes are in their terms general; but they apply only to offences committed within the territory, or by British subjects. When the legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute, as in the Merchant Shipping Act, and in some of the Admiralty Acts. If the Legislature of England, in express terms, applies its legislation to matters beyond its legislative capacity, an English court must obey the English legislature, however contrary to international comity such legislation may be. But unless there be definite express terms to the contrary, the statute is to be interpreted as applicable, and as intended to apply only to matters within the jurisdiction of the legislature by which it is enacted."

but we may be allowed to quote also from the opinions of

(*d*) Maxwell, 169-70; The Sussex Peerage Case, 11 Cl. & F. at p. 146; Jeffreys v. Boosey, 4 H. L. Cas. 815; Brook v. Brook, 9 H. L. Cas. 193; Cope v. Doherty, 2 DeG. & J. 614. And see Reg. v. Keyn, L. R. 2 Ex. D. 63; Routledge v. Low, L. R. 1 Chy. App. 42, 3 E. & I. App. 113; Atty.-Genl. of Hong-Kong v. Kwok-a-Sing, L. R. 5 P. C. 198.

(*e*) Maxwell, 179-80.

(*f*) Niboyet v. Niboyet, L. R. 4 P. D. at pp. 19-20.

two very eminent English Judges,—who in succession, occupied the position of Lord Chief Justice of England—in a very celebrated case arising out of the sinking of the English steamer “Strathclyde” by the German steamer “Franconia,” off Dover, in 1876 (*g*). Chief Justice Coleridge says :

“I do not of course forget that it is freely admitted to be within the competency of parliament to extend the realm how far so ever it pleases to extend it by enactments, at least so as to bind the tribunals of the country.”

Chief Justice Cockburn says :

“Now no proposition of law can be more incontestable, or more universally admitted, than that, according to the general law of nations, a foreigner though criminally responsible to the law of a nation not his own, for acts done by him while within the limits of its territory, cannot be made responsible to its law for acts done beyond such limits. . . . This rule must however be taken subject to this qualification, namely, that if the legislature of a particular country should think fit, by express enactment, to render foreigners subject to its law, with reference to offences committed beyond the limits of its territory, it would be incumbent on the courts of such country to give effect to such enactment, leaving it to the state to settle the question of international law with the governments of other nations.”

From these authorities, we may conclude that if the Imperial parliament should enact that any person, British subject or foreigner, committing such-and-such an act abroad, should, if found within British territory, suffer, upon conviction, a certain punishment(*h*); or that, in deciding a civil action in respect to contracts made abroad, to be performed abroad, English law should govern; there is <sup>NO</sup> ~~no~~ doubt, every British court of justice would be obliged to

(*g*) Reg. v. Keyn, L. R. 2 Ex. D. 63, at p. 152 and p. 160.

(*h*) See sec. 267 of the Merchant Shipping Act, 1854; Reg. v. Anderson, L. R. 1 C. C. R. 161. It required statutes to authorize a trial in one county of England for an offence committed in another county. See the valuable note to Keighley v. Bell, 4 F. & F. at p. 790.



give effect to the enactment. May we lay down the same rule in regard to a "confirmed" Act of a colonial legislature? We think not. Until very recently, there was no judicial decision directly upon this question, but there was high authority in support of the view here adopted—that a colonial legislature cannot affix a criminal character to acts committed beyond the territorial limits of the colony; and there would appear to be no argument in favor of this view, which would not be equally applicable to the case of colonial legislation affecting civil rights "accrued" abroad (*i*) (if we may use the expression). The high authority to which we refer as to criminal legislation, is that of the law officers of the Crown in England. In 1861, the parliament of (Old) Canada passed an Act to give jurisdiction to Canadian magistrates in reference to certain offences committed in New Brunswick. This Act was disallowed by order of the Queen in Council upon the report of the law officers of the Crown, who advised that "such a change cannot be legally effected by an Act of the colonial legislature, the jurisdiction of which is confined within the limits of the colony" (*j*).

And again, the Dominion parliament, in 1869, passed "An Act respecting perjury," the third section of which reads:

"3. Any person who wilfully and corruptly makes any false affidavit, affirmation, or declaration out of Canada, or out of any Province of Canada, before any functionary authorized to take the same for the purpose of being used in Canada, or in such Province, shall be deemed guilty of perjury, in like manner as if such false affidavit, affirmation or declaration had been made in Canada, or in such Province, before competent authority; and such person may be dealt with, indicted, tried and if convicted, be sentenced, and the offence may be laid and charged to have

(*i*) The legal rights arising out of a contract, are governed by the *lex loci contractus*; the *lex fori* governs as to the nature extent and character of the remedy, Forsyth, 239, 249.

(*j*) Jour. Leg. Ass. Can 1862, p. 101.

been committed, in that district, county or place where he has been apprehended or is in custody."

In a despatch (*k*) to the Governor-General, the Colonial Secretary adverts to this section as assuming "to affix criminal character to acts committed beyond the limits of the Dominion of Canada," and "as such a provision is beyond the legislative power of the Canadian parliament," he suggested amendment. The Act was not disallowed, but the acquiescence of the Minister of Justice in the correctness of the law laid down by the Colonial Secretary, is evidenced by the fact that the Act was amended in the very next session, so as to limit the operation of the third section to affidavits made in one province of the Dominion for use in another province (*l*).

Forsyth (*m*), in his collection of opinions on constitutional law, cites an opinion given by the law officers of the Crown (*n*), in England, in 1855:

"We conceive that the Colonial Legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from shore—or, at the utmost, can only do this over persons domiciled (*o*) in the colony, who may offend against its ordinances even beyond those limits, but not over other persons" (*p*).

In the case of *Peak v. Shields* (*q*) the question was discussed in our courts, but owing to the divergence of view on the part of the judges (particularly in the

(*k*) Can. Sess. Papers, 1870, No. 39; see Todd, "Parl. Govt. in Brit. Col." 150.

(*l*) 33 Vic. c. 26, amending 32-33 Vic. c. 23, s. 3.

(*m*) p. 24; see also p. 238.

(*n*) Sir J. Harding, Queen's Advocate; Sir A. E. Cockburn, A.G. (afterwards Lord Chief Justice of England); and Sir R. Bethell, S.G. (afterwards Lord Chancellor Westbury).

(*o*) See *post*, p. 193.

(*p*) See also Atty.-Gen. of Hong Kong v. Kwok-a Sing, L. R. 5 P. C. 179, and *re Goodhue*, 19 Grant 386, at pp. 404 and 452.

(*q*) 31 U. C. C. P. 112; 6 O. A. R. 639; 8 S. C. R. 579.

Supreme Court) the case can hardly be considered an authority (*r*). The plaintiffs invoked against the defendants a clause in the Insolvent Act of 1875, which, shortly stated, provided that when it was found on the trial of an action against an insolvent, that the debt sued for, had been contracted by him when, to his knowledge, he was unable to meet his engagements, he might be imprisoned for two years unless the debt and costs were sooner paid. In the case in question, the debt had been contracted in England. A majority of the judges, who rendered opinions in the case, held that the statute did not affix a criminal character to an act committed abroad; that the law enacted by the section, was a law *as to the remedy available in our courts*, and therefore valid (*s*). Of the Supreme Court, the majority who expressed an opinion on this constitutional point, decided against the applicability of the section, invoking the rules of interpretation to which we have before referred, as limiting the section to debts contracted in Canada; but at the same time serious doubt was expressed by each of these judges as to the validity of the enactment, in case its unambiguous meaning had admitted none but the wider interpretation. The position is thus clearly put by Mr. Justice Strong (*t*):

“ By the 91st section of the B. N. A. Act, the parliament of Canada is empowered to make laws for the peace order and good government of Canada. Does this warrant the enactment of statutes binding British subjects in respect of

¶ (*r*) As to the questions arising in this case, which involved consideration of the B. N. A. Act, see *post*, notes to s. 91, s.s. 21, etc.

(*s*) Somewhat analogous questions arise under the “ Act respecting Arrest and Imprisonment for Debt ” (R. S. O. c. 67). It is submitted that so far as these statutes make provision as to *the remedy to secure the performance of the obligation created by the contract sued on*, they apply to the case of proceedings for a debt contracted abroad; but that so far as they are punitive—whether technically “ criminal ” or not—they do not (as a matter of interpretation) so apply, and could not (as a matter of jurisdiction to enact them) be made so to apply.

(*t*) 8 S. C. R. at p. 596-7.

acts done without the territory of the Dominion, merely because they happen at the time to have a domicile in the Dominion? Or are not such persons, like all other subjects of the Queen, liable to be affected by no legislation regulating their personal conduct without the limits of the Dominion, save such as may be enacted by the Imperial legislature, the parliament of the United Kingdom? I think these weighty and important questions would arise and have to be determined in the present case, if we found in the enactment under consideration, either from express words or necessary implication, that it was the intention of the legislature to apply it to traders, domiciled inhabitants of Canada, making purchases without the Dominion. But as there is not the slightest indication of such a design, as respects this 136th section, we are relieved from the obligation of determining such a grave question of constitutional law."

The only other case in our courts, is *Regina v. Brierly (u)*, involving the validity of section 4 of the "Act respecting offences relating to the Law of Marriage" (R. S. C. c. 161):

"IV. Every one who being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony and liable to seven years' imprisonment:

"2. Nothing in this section contained shall extend to:  
(a) Any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty, resident in Canada, leaving the same with intent to commit the offence; . . ."

This section was held valid by the Divisional Court of the Chancery Divison, but in view of the decision about to be referred to, it would appear that this judgment can only be supported as to foreign marriages, upon the view that the offence dealt with by the section, is the leaving Canada with intent. The opinion of the Chancellor in that case, is—if to say so be permissible—a clear marshalling of all that can be urged in support of the jurisdiction of a colonial legislature to pass such an enactment; and were it not that *Regina v. Brierly* must be considered overruled by the



decision of the Judicial Committee of the Privy Council in the case about to be noted, it might be deemed an act of presumption to question the correctness of the principles enunciated. With all deference, it is submitted that the limitation of the lines of judicial investigation open to a Canadian judge, to a consideration of the express provisions of the B. N. A. Act on the one hand, and of the Colonial Laws Validity Act on the other, is to leave untouched those implied restrictions to which reference has been made in an earlier part of this chapter—such, *e. g.*, as those indicated in *Craw v. Ramsay* (v). The meaning given to the phrase, “extra territorial legislation” seems also unduly limited; in the books it is constantly used to describe the attempt by the legislature of one state, to determine the legal relation to arise, in that state, from acts done and contracts entered into in another.

Very opportunely, the report of the case, *McLeod v. Attorney-General for New South Wales* (w), before the Judicial Committee of the Privy Council, comes to hand. The legislature of that colony had upon its statute book the following enactment:

“Whosoever being married, marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.”

By applying to this enactment the rules of interpretation already discussed, the Committee construed the word “wheresoever,” as meaning “wheresoever in this colony.” The question of jurisdiction is thus dealt with:

“Their Lordships think it right to add, that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. . . . Their Lordships are far from suggesting

(v) See *ante*, p. 184, *et seq.*

(w) App. Cas. (1891) 455.

that the legislature of the colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is, that the language was used subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the colony."

It will be noticed, perhaps, that the report of this case does not disclose whether or not the appellant was a British subject, or whether he was, or was not, a resident of the colony. His first marriage took place in New South Wales, and it would appear that in the United States, where the second marriage was celebrated, he had in some way procured a divorce from his first wife. As to his nationality, the name is perhaps suggestive. It may therefore be thought that there is still room for argument as to the power of a colonial legislature to affix criminal character to acts done abroad by a British subject, whose domicile is in the colony, but there is nothing in the judgment of the Committee to support such a view.

In this connection it may be remarked that in regard to Imperial Acts, the question is one of construction merely; with us, it is a question of jurisdiction, or of construction to save jurisdiction. If the jurisdiction be wanting, the legislation is void—is not law—and would have to be judicially so held (*x*). Such an Act would be unconstitutional, in the proper sense of that term—*i.e.*, contrary to our constitution—and the very same doctrine which lays down, that it is the right and duty of a Canadian judge to declare void an Act of a provincial legislative assembly, trenching upon ground sacred to the parliament of Canada, lays down with equal force, that it is also his right and duty to declare void—as *ultra vires*—any Act, provincial or Dominion, which in its territorial scope exceeds the power of a colonial legislature (*y*).

(*x*) See Reg. v. Brierly, 14 O. R. 525.

(*y*) See the judgment of Marshall, C.J., in *Marbury v. Madison*, 1 Cranch, 137; Political Science Lectures, 1889, University of Michigan, p. 77, *et seq.*; *re Goodhue*, 19 Grant, at p. 452.

All the limitations upon our legislative power (always considered as to its sum total) have now probably been adverted to, and we may again refer to the position formerly taken (2), and may summarize by saying: Within the limits laid down, expressly or impliedly, by our charter—the B. N. A. Act—and subject always to Imperial control as before indicated (a), the powers of legislation possessed by the various legislative bodies existing in Canada, are plenary powers, and that, “jurisdiction conceded, the will of the legislature is omnipotent according to British theory, and knows no superior” (b). Paraphrasing the language of Chief Justice Marshall in a very celebrated case which came before the Supreme Court of the United States (c), we admit, as all must admit, that the powers of a colonial government are limited, and that its limits are not to be transcended; but the sound construction of the B. N. A. Act, must allow to the legislatures, that discretion with respect to the means by which these powers, conferred by it, are to be carried into execution, which will enable those bodies to perform the high duties assigned to them in the manner deemed most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are not prohibited but consistent with the letter and spirit of the constitution, are legal. Where the law is not prohibited, to undertake to enquire into the

(2) *Ante*, p. 177.

(a) *Ante*, Chap. VII.

(b) *Per* Mowat, A.G., *arguendo*, Reg. v. Severn, 2 S. C. R. at p. 81. The theory is not exclusively British, for, jurisdiction conceded, the same rule applies to Acts of Congress and of the State Legislatures in the adjoining Republic.

(c) *McCulloch v. Maryland*, 4 Wheat, 421. Note that Congress is given certain “enumerated powers” and also power “to make all laws which shall be necessary and proper for carrying into execution” those powers, etc. The B. N. A. Act gives to each legislature power to make laws “in relation to” the various matters as distributed between the various legislative bodies. If there is any distinction, ours is the wider phrase, and the principle of the decisions of the U. S. Supreme Court on this subject of “implied powers” is applicable *a fortiori* to the powers of our legislatures.

degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

In courts of justice in England and other British colonies, our law (statutory and common) is entitled to at least as full recognition and effect as the laws of any foreign nation—in accordance with the principles of comity (*d*). On appeals to Her Majesty in Her Privy Council, judicial recognition is, of course, accorded them (*e*); in other cases, they must be proved as fact, but it should be observed that in regard to the proof of our law, as embodied in legislative enactment, the 6th section (*f*) of the Colonial Laws Validity Act, 1865, provides for a simple method of proof, viz., a copy of the Act, certified as such by the proper officer of the legislature whose enactment it is.

In a late case (*g*) before the Judicial Committee of the Privy Council, it was very broadly laid down by Sir R. Phillimore, in delivering the judgment of the Committee, that the law contained in an Act of the legislature of a colony, and ratified by the express sanction of her Majesty, is, in every case to which it is applicable, of binding authority, equally in the Queen's High Courts in England, and in Vice-Admiralty Courts in the colonies. We are safe therefore in saying that (in an action in an English court, or the court of another colony, the law of Canada, statutory or common law, would, on proof in the manner before indicated, be given effect to, either on the doctrine of comity, or on the stronger doctrine enunciated in *Redpath v. Allen*.

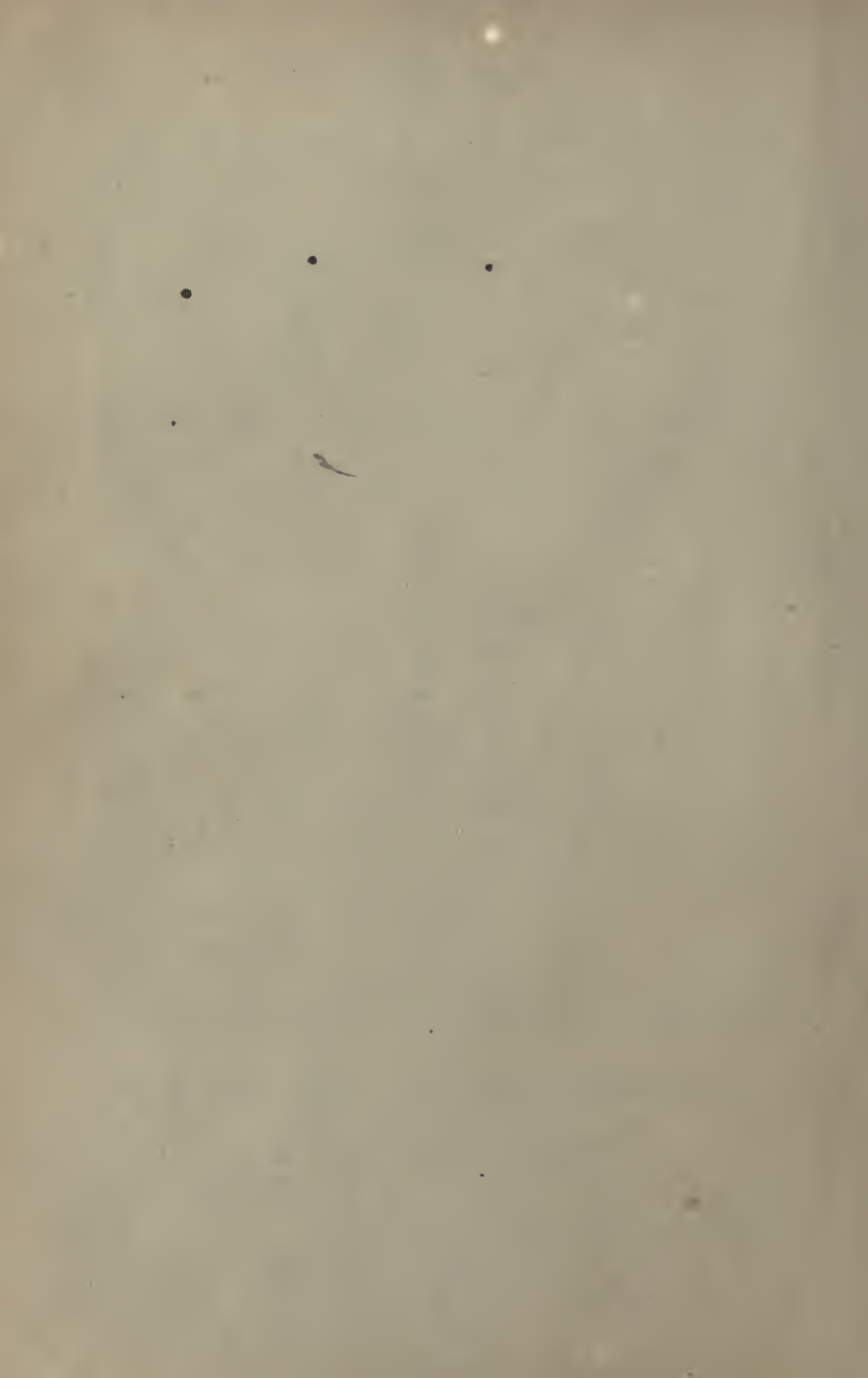
(*d*) *Phillips v. Eyre*, L. R. 4 Q. B. at p. 241; *Reg. v. Brierly*, 14 O. R. at p. 534.

(*e*) *Cameron v. Kyte*, 3 Knapp, P. C. at p. 345.

(*f*) 23 & 29 Vic. c. 63 (Imp.). Is this section in force in the colonies? or does it merely affect the method of proof in the *English* courts?

(*g*) *Redpath v. Allen*, L. R. 4 P. C. 511.





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PART III.

THE ORIGINAL GROUP.

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## CHAPTER X.

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### THE DIVISION OF THE FIELD.

In the earlier chapters of this book, the practical oneness of the spheres of authority of the legislative and executive departments of government has been insisted upon, and the legal supremacy of the former over the latter pointed out (*a*). Expressed in another way and in reference to a government of limited authority, it may be said that to fix the sphere of authority of the legislative department of such a government, is to fix at the same time the sphere of authority of the executive department of that government. Applying that principle to the Canadian constitution, it will be at once seen how important it is to fix, if possible, the exact line which is to divide, for legislative purposes, the field of colonial authority between the Dominion parliament and the Provincial legislative assemblies. For, that line found, we have likewise established the line of division between the Dominion and the Provinces for the purposes of executive government.

Before entering upon an examination in detail of the sections of the B. N. A. Act which provide for the distribution of legislative power, we may shortly advert to the laws and legal institutions existing in the different provinces at the time the B. N. A. Act took effect, and to some general principles which have been authoritatively established in reference to the nature of the division effected by the Act.

(a) See *ante*, p. 12, p. 22, *et seq.*, p. 46, *et seq.*, and Chap. VI.



I.—When the Union took effect, there was in existence in each of the individual provinces, a legal system—a “body” of laws and legal institutions. By sec. 129 of the B. N. A. Act, it was provided that all laws, etc., in existence in the different provinces at the time of the Union, “shall continue . . . as if the Union had not been made, subject nevertheless (except with respect to such as are enacted by or exist under Acts of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished or altered by the parliament of Canada, or by the Legislature of the respective province, *according to the authority of the parliament or of that legislature under this Act.*”

This mass of laws and legal institutions may be considered the raw material, so to speak, upon which the legislatures of the Dominion and the respective provinces were to operate, *each according to its authority under the B. N. A. Act*; and it must be borne in mind that we have laws (common law and statutory enactments) on many subjects which have come down to us from pre-Confederation days, and these can be repealed or altered only by that legislative body which could now, were they non-existent, enact them (*b*). The division, therefore, effected by the B. N. A. Act, was a present division of the whole body of existing *law* (in its widest sense), as well as a division of the field for future exercise of authority (*c*). Of course, the body of law in existence when the B. N. A. Act came into force was of provincial creation, but at once upon that Act taking effect, that portion of existing laws, etc., which fell within the sphere of authority of the Dominion parliament, became what we may call a body of Dominion law, while the remainder might, not inaptly, be designated a body of provincial laws.

(*b*) *Dobie v. Temporalities Board*, 7 App. Cas. 136.

(*c*) See *ante*, pp. 49, 50.

✓ II.—*The division effected by the B. N. A. Act is exhaustive.* The limitations upon our powers of self-government, arising from our colonial status, have been already dealt with (d). The power to legislate along certain lines and in reference to certain matters, deemed to be matters of Imperial concern, has been expressly or is impliedly withheld; but of all the matters in respect to which we have power—i.e., of the entire field of self-government allotted to us—the B. N. A. Act effects a division, assigning certain classes of those matters to the Provincial assemblies, and the balance to the parliament of Canada.

The following passage from a recent judgment of the Judicial Committee of the Privy Council discloses the contention to the contrary which had been raised, and finally disposes of it: (e)

“It only remains to refer to some of the grounds taken by the learned judges of the Lower Courts which have been strongly objected to at the Bar. . . . It has been suggested that the provincial legislatures possess powers of legislation either inherent in them, or dating from a time anterior to the Federation Act, and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondent’s counsel, and therefore possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent. . . . They adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures, rests with the Parliament (f).”

✓ III.—The parliament of Canada and the provincial assemblies possess, each within the sphere assigned to it,

(d) See Chap. IX.

(e) Bank of Toronto v. Lambe, 12 App. Cas. at p. 587.

(f) See further upon this point, the notes to the opening clause of sec. 91 *post*.

plenary powers of legislation. This attribute of colonial legislatures has been examined at some length in the last chapter, and we need here only emphasize this fact, that there is no distinction whatever, in this regard, between the Dominion parliament and the assemblies of the different provinces. The principle has been applied alike to the legislative power of each—to uphold, for example, the “local option” clauses of the Canada Temperance Act (*g*), and the delegation of power to license commissioners, under the Ontario Liquor License Acts (*h*).

IV.—In a country under the rule of law, it necessarily devolves upon the courts which administer law, to enquire and determine, in any given case, whether an Act of a legislature having authority over a limited range of subject matters, is within or without its powers,—is or is not *law*. As we have already pointed out (*i*), long before the passage of the B. N. A. Act, English and Colonial judges had been called on to consider colonial Acts, and to determine the question of their legal validity; and the duty of the courts to determine like questions under the B. N. A. Act, was no new jurisdiction, although full appreciation of the extent of their judicial authority in this regard, seems to have dawned on Canadian judges with something like surprise. It serves to indicate how small is the range of matters with which colonial legislatures are unable to deal, that we find colonial judges almost forgetting that any limits exist (*j*). After twenty-five years of experience

(*g*) Russell v. Reg., 7 App. Cas. 829.

(*h*) Hodges v. Reg., 9 App. Cas. 117. See also Reg. v. O'Rourke, 1 O. R. 465, 32 U. C. C. P. 388, as to the adoption by the Dominion Parliament, for purposes of criminal procedure, of Provincial Acts respecting jurors.

(*i*) See Chap. IV. and Chap. IX., *ante*.

(*j*) In this connection we may point out that in *L'Union St. Jacques v. Bélisle*, L. R. 6 P. C. 31, the reporter states the question involved to be whether the Act there impugned was or was not *repugnant to the B. N. A. Act*—a strictly accurate way of putting it, but in these days not followed.

under our federal system, the exercise by the courts of this function, excites no remark, and the cases on this branch of Canadian jurisprudence now fill many volumes. Under the legal system of the British Empire, the "last word" upon these questions rests with the Judicial Committee of the Privy Council, and so far as that tribunal has spoken, and so far as the principles enunciated in its judgments extend, its decisions are binding upon our courts. In a number of cases they have determined the position of the line of division in regard to the subject matters immediately involved in those cases, and they have likewise enunciated certain principles which must hereafter guide us in determining the line of division as to many subject matters with which they have not directly dealt. Our first duty therefore is to examine their judgments. Next in order of authority will come the judgments of the Supreme Court of Canada; then, for each province, the provincial Court of final resort in the province, and so on through the whole range of the judiciary.

Apart from certain sections which confer legislative powers in reference to the conduct of business in the different legislatures (*k*), and in reference to elections (*l*), the distribution of legislative power is provided for, in sections 91-95 of the B. N. A. Act. We deal in this place with sections 91 and 92 only, and have, for convenience of reference and comparison, placed them side by side.

(*k*) See secs. 18, 35, 47, 78, 87, etc.; see also 28 & 29 Vic. c. 63, s. 5 (Imp.), and particularly notes to sec. 35.

(*l*) See notes to secs. 40, 41, 51, 80, 83, and 84, *post*.



## POWERS OF THE PARLIAMENT.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

1. The public debt and property.
2. The regulation of trade and commerce.
3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The census and statistics.
7. Militia, military and naval service, and defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, buoys, lighthouses, and Sable Island.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea Coast and inland fisheries.
13. Ferries between a Province and any British or Foreign Country, or between two Provinces.
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings Banks.
17. Weights and measures.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and Insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians and lands reserved for the Indians.
25. Naturalization and aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.
28. The establishment, maintenance, and management of penitentiaries.
29. Such Classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

## EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say :—

1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.
- ✓ 2. Direct taxation within the Province in order to the raising of a revenue for Provincial purposes. (*See B 97 & Table IV. last.*)
3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of Provincial offices, and the appointment and payment of Provincial officers.
5. The management and sale of the public lands belonging to the Province and the timber and wood thereon.
6. The establishment, maintenance and management of Public and Reformatory Prisons in and for the Province.
7. The establishment, maintenance, and management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
- ✓ 8. Municipal Institutions in the Province.
9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a Revenue for Provincial, Local, or Municipal purposes.
10. Local works and undertakings other than such as are of the following classes,—
  - a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;
  - b. Lines of steamships between the Province and any British or foreign country;
  - c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.
- ✓ 11. The incorporation of Companies with Provincial objects.
12. The solemnization of marriage in the Province.
- ✱ 13. Property and civil rights in the Province.
- ✱ 14. The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
- ✱ 16. Generally all matters of a merely local or private nature in the Province.

A perusal, the most cursory, of the classes enumerated in the various sub-sections (*m*) of these two sections, reveals that if, in every case, the full natural meaning is to be given to the words employed, the classes must inevitably overlap. But the Act is clear that the jurisdiction in each case is *exclusive* (*n*), and, therefore, in the case of one of the sections, or of the other, or of both, that full natural meaning cannot be given. If either one of the sections is to be so read as to give to the language used in every one of its sub-sections its full natural meaning, the other section must necessarily be read as a subordinate section, and the meaning of its various sub-sections so limited as to exclude those subject matters monopolized by the various sub-sections of the favored section. If neither section is to be set up as a favorite, by what rule or rules are we to be guided in reconciling them? For, reconcile them we must, if the jurisdiction in each case is exclusive. The first method was favored by the earlier decisions of our Supreme Court. Section 91 was set up as the predominant section, and this formula was suggested, and practically adopted by the majority of the court, as an unerring guide to the determination of the line of division as to any given subject matter:

“All subjects of whatever nature not exclusively assigned to the local legislatures, are placed under the supreme control of the Dominion parliament; and no matter is exclusively assigned to the local legislatures, unless it be within one of the subjects expressly enumerated in section 92, *and at the same time does not involve any interference with any of the subjects enumerated in section 91*” (*o*).

(*m*) Strictly speaking, they are not sub-sections, but it is convenient to speak of them as such.

(*n*) See *ante*, p. 67, for a suggested interpretation of this word. In addition to the authorities there referred to, see Todd, “Parl. Gov. Brit. Col.” p. 189, *et seq.*

(*o*) *Per* Gwynne, J., in *City of Frederickton v. Reg.* 3 S. C. R. at p. 568; and see *Citizens v. Parsons*, 4 S. C. R. at p. 330.

Had this rigid formula been finally adopted, the position of a province would have been that of a very minor municipality, and the union of the provinces legislative rather than federal. Its adoption by the Supreme Court was largely owing to a misconstruction of the closing words of section 91. "The class of matters of a local or private nature" was held to refer to and embrace the whole of the sub-sections of section 92, although the singular number is used in immediate contradistinction to the plural—"the class . . . comprised in the enumeration of the classes"—and although this grammatical reference to sub-section 16 only of section 92, had been clearly recognized in an earlier judgment of the Judicial Committee of the Privy Council (*p*). The labors of the courts would certainly have been materially lightened, had that Committee accepted this formula. While, in a sense, it reconciled sections 91 and 92, it did away with any necessity for an attempt to reconcile their respective sub-sections. Fortunately for the provinces, the Committee has decisively rejected this formula, while at the same time (as we shall see) adopting it up to a certain point as a method of inquiry. The view of the Committee is set out in a case (*q*) which must now be considered classic on this vital question, in the following language:

"The scheme of this legislation, as expressed in the first branch of section 91, is to give to the Dominion parliament, authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in section 92, had been altogether distinct and different from those in section 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative

(*p*) *L'Union St. Jacques v. Belisle*, L. R. 6 P. C. at p. 35. See the reporter's way of putting it at p. 33; and see notes to the final clause of sec. 91, *post*.

(*q*) *Citizens v. Parsons*, 7 App. Cas. 96, at p. 107, *et seq.*



power over the sixteen classes of subjects assigned to them, and the Dominion parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into, and were embraced by some of the enumerated classes of subjects in section 91; hence an endeavor appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section," that (notwithstanding anything in the Act) the exclusive legislative authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of section 92.

"Notwithstanding this endeavor to give pre-eminence to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature, should be absorbed in those given to the Dominion parliament. Take as one instance, the subject 'marriage and divorce,' contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description; yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces (r). So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the

(r) See 3 S. C. R. at pp. 568-9, where Mr. Justice Gwynne seeks to fit the formula above quoted to these two sub-sections.

provincial legislatures by section 92, it obviously could not have been intended that in this instance also, the general power should override the particular one (*s*). With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects, in the legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them, the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, *the two sections must be read together, and the language of one interpreted and, where necessary, modified by that of the other.* In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand.

The first question to be decided is, whether the Act impeached in the present appeal (*t*) falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects, that the further questions arise, viz: whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the provincial legislature is, or is not, thereby overborne."

The part italicized constitutes the essential distinction between the formula already quoted, and the method of enquiry adopted by the Judicial Committee of the Privy

(*s*) See notes to sec. 91, s-s. 3, *post*.

(*t*) A provincial Act. ✓

Council. The formula did away with all necessity for the third enquiry, and, by consequence, with, as we have said, all necessity for a reconciliation of the various sub-sections of sections 91 and 92.

The statute impugned in the case from which we have quoted, was a provincial Act, but in another case in the same volume (*u*), the very same method of enquiry was adopted in reference to a Dominion Act, and has since been reaffirmed by the same tribunal as proper in regard to both Dominion and Provincial legislation. The propriety of this method of enquiry was finally established when the exhaustive character of the division effected by the B. N. A. Act was definitely enunciated (*v*).

Although the Judicial Committee of the Privy Council has frequently reiterated the caution against "entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand," and in a late case (*w*) has laid down, that courts of law "must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes," their judgments do lay down a number of rules of construction applicable to the elucidation of these two sections of the B. N. A. Act, which, even if not exclusively applicable to this statute, are certainly peculiarly helpful in interpreting its meaning.

(a) *The sections must be read together, and the language of the one interpreted and, where necessary, modified by that of the other* (*x*).

This rule is not to be limited to a comparison and reconciliation of one sub-section of section 91, with an apparently conflicting sub-section of section 92. In order

(u) Russell v. Reg., 7 App. Cas. 829 ; at p. 836.

(v) See *ante*, p. 201.

(w) Bank of Toronto v. Lambe, 12 App. Cas. at p. 579.

(x) Citizens v. Parsons, 7 App. Cas. 96 ; see the entire passage quoted, *ante*, p. 207, *et seq.*

to arrive at the meaning of any sub-section of (say) section 91, the other sub-sections of that same section must be examined. As a result of such examination, there has been suggested what may be called a sub-rule of construction which has been applied in a number of cases to limit the scope of some, at least, of the sub-sections of section 91. In one of the earliest cases (*y*) which came before the Judicial Committee of the Privy Council, involving consideration of sub-section 21, of section 91,—“bankruptcy and insolvency”—the Committee speaking generally of section 91 say :

“ Their Lordships observe that the scheme of enumeration in that section is to mention various categories of general subjects which may be dealt with by legislation. There is no indication *in any instance* of anything being contemplated, except what may be properly described as general legislation ; such legislation as is well expressed by Mr. Justice Caron, when he speaks of the general laws governing Faillite, bankruptcy and insolvency, all which are well-known legal terms expressing systems of legislation, with which the subjects of this country and probably of most other civilized countries are perfectly familiar.

This language was used, as we have said, in reference to section 91 generally, and has never been adversely criticized in subsequent judgments of the Committee. The principle has been applied to a number of the other sub-sections of section 91. In the very case from which the rule is quoted, the meaning of the terms, “ regulation of trade and commerce ” (*z*) was restricted: (1) because their collocation with classes of subjects of national and general concern, affords an indication that regulations relating to general trade and commerce were in the mind of the legislature when conferring this power on the Dominion parliament; and (2) because unless intended to have a limited meaning they would have rendered unnecessary the sub-

(*y*) *L'Union St. Jacques v. Belisle*, L. R. 6 P. C. 31 at p. 36.

(*z*) s-s. 2 ; see the notes to this s-s.



sections dealing with, *e.g.*, banking, weights and measures, negotiable instruments, etc. (a). So in reference to legislation relating to navigation and shipping (b); but just how far this rule of construction is to be applied to each one of the various sub-sections of section 91, is matter of doubt, as a reference to the various cases which have arisen and been decided under those various sub-sections will disclose.

Reverting however to the rule above laid down, so far as it enjoins a comparison of the various sub-sections of section 91 with apparently conflicting sub-sections of section 92, and *vice versa*, we may point out that the passage we have quoted from *Citizens v. Parsons* affords two instances of its application, and we need not in this place enlarge upon the rule, as very few cases arise which do not call for its application.

(b) *In order to arrive at the proper meaning of the various sub-sections of these two sections, other parts of the B. N. A. Act, and of other Imperial Acts, in pari materia may be looked at (c).*

For example, in construing sub-section 2 of section 91, the meaning proper to be given to the terms, "regulation of trade and commerce," was to a certain extent determined by the meaning given to a somewhat similar phrase in the Union Act which joined Scotland to England in legislative union (d), and the meaning to be given to the 13th sub-section of section 92, "property and civil rights in the province," was elucidated by reference to the same phrase in section 94 of the B. N. A. Act, and in section 8 of the Quebec Act, 1774 (e).

(c) *The true nature and character of the legislation in the particular instance under discussion, must always be*

(a) 7 App. Cas. at p. 112.

(b) See notes to sec. 91, s-s. 10, *post*.

(c) *Citizens v. Parsons*, 7 App. Cas. 96.

(d) See the passage quoted in the notes to sec. 91, s-s. 2, *post*.

(e) See note (e) *ante*, p. 96; and notes to sec. 92, s-s. 13, *post*.

*determined in order to ascertain the class of subject to which it really belongs,—or, in other words, what is the primary matter dealt with? (f).*

Applying this rule of construction, the Judicial Committee of the Privy Council held (g) that the Canada Temperance Act was not legislation on the subject of licenses or relating to civil rights in a province, but general legislation for the order and good government of the Dominion;—that the Act respecting uniform conditions in fire insurance policies, was legislation respecting “property and civil rights in the province,” and not respecting “the regulation of trade and commerce” in the proper sense of the latter sub-section (h);—that the imposition of a stamp duty on policies of insurance was not a license Act, although so called in the impugned statute (i);—that an Act for levying a rate to pay a bonus to an existing railway, was not an Act respecting “local works and undertakings,” and therefore was not subject to the exceptions mentioned in the sub-section dealing with those matters (j)—that an Act in regulation of the internal affairs of a particular corporation was not a bankruptcy or insolvency Act (k).

(d) *If, on the due construction of the Act, a legislative power be found to fall within either section, it would be quite wrong to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the other legislature (l).*

(e) *Subjects which in one aspect and for one purpose fall within section 92, may, in another aspect and for another purpose, fall within section 91 (m).*

(f) *Russell v. Reg.*, 7 App. Cas. 829; at p. 839.

(g) *Russell v. Reg.*, *ubi supra*.

(h) *Citizens v. Parsons*, 7 App. Cas. 96.

(i) *Reed v. Atty.-Genl. of Quebec*, 10 App. Cas. 141.

(j) *Dow v. Black*, L. R. 6 P. C. 272; see notes to sec. 92, s-s. 2.

(k) *L'Union St. Jacques v. Bélisle*, L. R. 6 P. C. 31.

(l) *Bank of Toronto v. Lambe*, 12 App. Cas. at p. 537.

(m) *Hodge v. Reg.*, 9 App. Cas. at p. 130.

We deal with these two rules together, because they both suggest the existence of possibly concurrent powers (*n*), probably the most perplexing question which arises under these sections of the B. N. A. Act. In order to deal intelligently with this question, we must endeavor to get a clear idea of the meaning of the phrases "*conflict of laws*," and "*concurrent powers*." Any case which comes up for judicial decision involves the application of law to facts. The law applicable may be unquestioned, and the dispute be as to the facts, or, the facts being determined, the dispute may be as to the law applicable thereto. This latter aspect is the one with which we have to deal. As Von Savigny puts it, out of any given state of facts arise "legal relations," one or more, capable presumably of a definite, absolutely correct determination. As to any one of these legal relations there cannot be a conflict of laws. Of any number of laws put forward as determining the "legal relation," one only is the law which governs. The views of advocates, and even judges, may conflict, but the law, though it may be, from time to time, varied at the will of the law-making body in the state, is, at any given moment of time, a thing certain. It follows that there cannot be two statutes determining, in different ways, any one of the legal relations which is to arise from any given state of facts. If there be two statutes purporting so to do, one of them must be of no legal effect, either because repealed by the other (*o*), or by some rule of law made subordinate thereto as to the particular legal relation. It follows, too, that, unless "chaos has come again," there cannot be in two legislative bodies concurrent powers of legislation in reference to the same legal relation, in the sense, that in the same moment of time the enactment of each is law (*p*).

(*n*) Jessel, M.R., had suggested this, in *Atty.-Gen. of Quebec v. Queen Ins. Co.*, 3 App. Cas. at p. 1097.

(*o*) This is sometimes discussed as a conflict in *time*; the other as a conflict in *space*.

(*p*) See however *per* Wilson, J., in *Reg. v. Taylor*, 36 U. C. Q. B. at p. 206.

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This is recognized in the B. N. A. Act, for in section 95, where powers of legislation are given, over the same subject matter, to both the Dominion and the Provincial legislatures, there is the express provision that the legislation is not to be concurrent; that the enactment of a Provincial legislature is to be law only in the absence of Dominion legislation upon the subject matter. The first of the two rules at the head of this paragraph, would seem to indicate that in the view of the Judicial Committee of the Privy Council, the absence of legislation by one legislature, Dominion or provincial, upon the particular subject matter may increase the range open to the other. This view has to be reconciled with the use of the term "exclusive power," in reference to each enumeration of classes of subjects; or, if there is no possible mode of reconciliation, the view of the Privy Council must be an unsound *obiter*. The way of escape seems to be suggested by the second of the rules at the head of this paragraph. The different aspects any given subject may present, have reference to the different 'legal relations' that may arise, or (from a legislative standpoint) be created in connection with that subject. Now, these two sections of the B. N. A. Act, deal with the various enumerated classes of subjects, not as divisions of facts, but as divisions of legal relations. Insolvency, for example, is not a fact at all; civil rights are not facts—both are legal relations arising out of a certain juxtaposition and co-relation of facts. Without unduly enlarging upon this theme it seems to us that a correct appreciation of this principle of division will help to make clear just in what sense legislation by one legislature (Dominion or Provincial) may lessen the range open to the other; in what sense the legislation of one may interfere with the legislation of the other. In the case from which the first of the rules now being discussed is quoted, that rule was applied to uphold the taxation of banks by provincial legislation (under section 92, s-s. 2), notwithstanding that "banking, the incorporation of banks, and the issue of paper money," is one of the classes of subjects assigned



to the exclusive ken of the Dominion parliament. Should the Dominion parliament repeal all existing laws upon this head, the legal relation—a bank—would be non-existent, could not be created by provincial legislation, and could not be seized upon, therefore, in order to attach to it the further legal relation of liability to pay taxes to the provincial treasury. And on the other hand, an excessive tax upon banks might possibly operate to prevent the correlation of facts arising in any particular instance, upon which Dominion legislation might attach. No subject matter has been more fruitful in producing cases for decision under the B. N. A. Act, than the liquor traffic (*q*). The Judicial Committee of the Privy Council has in effect held (*r*) that the Dominion parliament may create such legal relations out of the facts of the liquor traffic, as to prevent the creation by provincial legislation of other legal relations out of the same facts; or perhaps we should rather say, the Dominion parliament has power to prevent the facts themselves from having any existence capable of legislative recognition by a provincial legislature.

In an earlier case the extent of the power of the Dominion parliament along the line of bankruptcy and insolvency was authoritatively enunciated by the same tribunal (*s*), and the power of the provincial legislatures along the same line, (now that we have no Dominion law upon this subject) has been frequently discussed. It is submitted that in the absence of legislation by the Dominion parliament, creative of any such legal relation as bankruptcy or insolvency, the provincial legislatures have full power (under section 92, sub-section 13—"property and civil rights in the province") to create such legal relations out of the facts of commercial life as to ensure, if deemed expedient,

(*q*) See notes to sec. 91, s.s. 2, and sec. 92, s.s. 8 and 9.

(*r*) *Russell v. Reg.*, 7 App. Cas. 829.

(*s*) *Cushing v. Dupuy*, 5 App. Cas. 409, at p. 415; and see *L'Union St. Jacques v. Pélisle*, L. R. 6 P. C. 31, at p. 36; and notes to sec. 91, s.s. 21, *post*.

the equitable distribution of the estate of a man whose assets do not cover his liabilities, and to ensure also the discharge of the debtor from the balance of such liabilities. In the absence of legislation by the Dominion, no set of facts can constitute a legal relation to be known as bankruptcy or insolvency (*t*). By creating such a legal relation, to arise from such co-relation of facts as to the Dominion parliament might seem meet, the power of the provincial legislatures would be curtailed. Any attempt to state the *essential* elements of bankruptcy and insolvency legislation outside of a legislative definition of those terms, leaves one about as much in the dark as does Milton's description of Death. yah!

(f) *The presumption, in any given case, is in favor of the validity of an impugned Act.* (*u*) + *...*

In the celebrated case (*u*) involving the validity of the Dominion Controverted Elections Act, 1874 the Judicial Committee of the Privy Council laid down the rule in this language :

"It is not to be presumed that the legislature of the Dominion has exceeded its powers unless upon grounds really of a serious character."

In numerous subsequent cases the principle has been invoked. One of the latest expressions of the rule is that "in cases of doubt every possible presumption and intention will be made in favor of the constitutionality of the Act" (*v*). It does not apply to an Act, the language of which is unambiguous, and the effect (if the Act be held valid) clearly beyond the competence of the legislature by which the Act was passed. It indicates, rather, a principle of interpretation, and may be put thus: If possible such a meaning will be given to a statute as to uphold its validity,

(t) "Persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law"—L. R. 6 P. C. at p. 36.

(u) *Valin v. Langlois*, 5 App. Cas. 115.

(v) *Reg. v. Wason*, 17 O. A. R. 221; *per* Burton, J.A., at p. 235.

for a legislative body must be held to intend to keep within its powers. No stronger instance of the application of this principle of interpretation could be cited than that afforded by the very recent case which came before the Judicial Committee of the Privy Council, from New South Wales (*w*). The legislature of that colony had enacted :

“ Whosoever being married, marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.”

The Lord Chancellor (Lord Halsbury), in delivering the judgment of the Committee, says :

In the first place it is necessary to construe the word ‘whosoever’; and in its proper meaning it comprehends all persons all over the world, natives of whatever country. The next word which is to be construed is ‘wheresoever.’ There is no limit of person according to one construction of ‘whosoever,’ and the word ‘wheresoever,’ is equally universal in its application. Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute; the colony can have no such jurisdiction, and their Lordships do not desire to attribute to the colonial legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations to see what would be the reasonable limitation to apply to words so general; and their Lordships take it, that the words, ‘whosoever being married,’ mean, ‘whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the colony of New South Wales.’ . . . . . ‘Wheresoever’ may be read, ‘wheresoever in this colony’ . . . . . It appears to their Lordships that the effect of giving the wider interpretation

to this statute would be . . . that the statute was *ultra vires* of the colonial legislature to pass. Their Lordships are far from suggesting that the legislature of the colony did mean to give to themselves so wide a jurisdiction."

A neat way of "letting them down easy!" <sup>now lett. as lett.</sup> What the colonial legislature did really intend can hardly be matter of doubt, but, in favor of validity, it was held that they could not be even supposed to have intended to go beyond the limits of their legislative competence (x).

The B. N. A. Act, as we all know, is largely founded on the resolutions of the Quebec Conference, and the question naturally arises, how far may these resolutions be looked at in interpreting the B. N. A. Act? Canadian judges have frequently quoted from the resolutions, and have utilized them to aid in the construction of doubtful passages in the Act; but it is worthy of note that the tribunal of last resort—the Judicial Committee of the Privy Council—has never made reference to them in its judgments. In the decision of questions strictly legal—such as would come before the courts rather than before the legislatures—these resolutions can afford, at all events at this date, very little assistance, and at the most only in the absence of all light from other parts of the statute, or in cases perhaps where these resolutions might clearly support or negative one of two possible interpretations. The fact that the B. N. A. Act must be judicially interpreted as expressing the will of the Imperial parliament, rather than of the federating provinces, tends to make it very doubtful

(x) See, also, *Atty. Genl. for Canada v. Atty. Genl. of Ontario*, 20 O. R. at pp. 245-6, and 19 O. A. R. at p. 33. Many other canons of construction will be found throughout the cases which have involved consideration of the B. N. A. Act. See notes to the various sections, *post*. In this place we have endeavored to gather into one chapter the most important of those rules which aid in the determination of the line of division between the Dominion and the Provinces. It should perhaps be noticed here that the Judicial Committee of the Privy Council have not been unmindful of the large political character of the B. N. A. Act. See *Atty. Genl. of Ont. v. Mercer*, 8 App. Cas. at p. 778.



how far, if at all, it is proper to refer to these resolutions. The fact, too, that they were subjected to revision by the delegates from the various provinces, at London, renders them still more unreliable as *legal* guides to the interpretation of the B. N. A. Act.

There is another matter which merits mention in this place, the extent, namely, to which we may avail ourselves of the judicial decisions of the American Courts—particularly of the Supreme Court of the United States—upon cases involving inquiry as to the powers of Congress and the State legislatures respectively. They are not, of course, authorities binding upon our courts, but under proper safeguards, are very valuable aids to the study of our Act (*y*). The real difficulty; the risk even, in utilizing them for purposes of illustration, arises from the difference not only in the principle, but also in the method of division. There are certain matters on which neither the Dominion parliament, nor a provincial legislature can legislate (*z*); and so, under the American system, there are certain laws which neither Congress nor a State legislature can pass. But there is not the slightest ground for comparison as to the nature and character of the subjects which are withheld from the legislative competency of our legislatures and theirs, respectively. We are debarred from legislating upon certain matters, because those matters are deemed to be of Imperial concern, while, on the contrary, the legislative power of both Congress and the State legislatures is circumscribed in favor of individual liberty (*a*); and in some of the State constitutions, more lately adopted, the limitations on the legislative power of the State legislature certainly go to very extreme lengths (*b*). It cannot be said, therefore, in reference to the American system, that

(*y*) See the remarks of Hagarty, C.J., in *Leprohon v. Ottawa*, 2 O. A. R. at p. 533.

(*z*) See Chap. IX. *ante*.

(*a*) See Art. I. secs. 9 and 10.

(*b*) Bryce's "American Commonwealth," Appx.

if power over a certain subject matter is not with Congress it must be with the State legislatures, for it may be with neither. The "people of the United States," as a grand aggregate, have limited the power of Congress, and the people of the individual states, viewed as smaller aggregates, have likewise limited the sphere of authority of the different State legislatures. The matters allotted to Congress are, in a sense, specially enumerated, the unenumerated residuum being reserved (subject to certain prohibitions set out in the Constitution of the United States) (*c*) to the States or to the people; but the State legislatures again may be, and in many cases are, under the State constitutions, bodies with specially enumerated powers. In short, in the American system there are matters over which no body has legislative power, matters held in reserve, as it were, by the people of the United States, or by the people of the respective States. Confining our attention to Congress, we have to point out, what has been before referred to (*d*), that after the enumeration of the special matters (themselves described in very comprehensive terms) over which Congress is to have legislative power, there follows this clause (*e*):

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department, or officer thereof": and under this clause, as construed by Marshall and his successors, the powers of Congress in relation to the National government of the United States can hardly be said to be specially enumerated powers only.

Nothing short of the most thorough mastery of the United States constitutional system would warrant one in drawing analogies between the line of division they have adopted and that drawn by the B. N. A. Act. The Judicial Committee of the Privy Council, while not slow to express

(*c*) Art. I., sec. 10.

(*d*) *Ante*, p. 9.

(*e*) Art. I., sec. 8.

their admiration for the Supreme Court of the United States, and the eminent jurists who from time to time have occupied seats in that tribunal, have always deprecated any attempt to draw analogies between the Canadian and the American systems. The view of the Committee is thus expressed in a late case (*f*):

“ Their Lordships have been invited . . . . to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each State may make laws for itself, uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution, Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act, must be so construed as to allow no power to the provincial legislatures, under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other.”

This passage suggests that, in the view of the Committee, the absence of the power of disallowing State legislation may have led the United States courts to scrutinize that legislation more closely, and may have caused the adoption of the wide interpretation of the article of the “ Constitution ” above quoted.

(*f*) Bank of Toronto v. Lambe, 12 App. Cas. at p. 587.

CHAPTER XI.

as inf.

OUR JUDICIAL SYSTEM.

We have thus far treated of government as divisible into two chief departments—law-making and law-executing—and have not deemed it expedient to complicate the discussion by reference to any further sub-divisions of these two departments. There is however a very distinct division of the executive department into branches, administrative and judicial; the former concerned with what we may call the ordinary administration of public affairs, while upon the latter devolves the duty of expounding, applying and enforcing law between litigants (a).

Tribunals for the administration of justice are an indispensable adjunct of any system of civilized government, and if there can be degrees of importance in connection with such a matter, we would say that in every country where government is a government-according-to-law, due recognition of the authority of the courts is of vital importance to good government; and particularly is this the case where the field for the exercise of the functions of government, both legislative and executive, is divided, and

(a) Of late years there is apparent a tendency to clothe the judiciary with what may be termed "advisory" functions, in aid of the Executive. See R. S. C. c. 135, ss. 37 and 38, and cases noted in Cassel's Dig.; R. S. O. c. 44, s. 52, s-s. 2; Attorney-General for Canada v. Attorney-General for Ontario, 20 O. R. 222; 19 O. R. 31. Also see R. S. O. c. 225; *In re R. C. Separate Schools*, 18 O. R. 606. The policy of this innovation is questionable. The Courts of the United States have steadily declined to exercise any such functions. See Mich. Univ. Law Lectures, 1889.



where, in consequence, the courts have necessarily to decide on the validity or invalidity of legislative enactments, and of executive action founded thereon (*b*).

The decision of any case which may come before a court of law, involves the application of law to the facts as they may be admitted, or judicially determined, to exist. Out of every fact, or set of facts there arise "legal relations," and, as was pointed out in the last chapter (*c*), there can be no *conflict* of law in reference to any given legal relation, for the law applicable to any given circumstances—to any stated facts—is presumedly capable of definite exposition. It may happen, therefore, that in a case arising in a Canadian court, the law which governs the legal relations which arise out of the facts of the case may be, not the law laid down in either Dominion or Provincial statutes; not, strictly speakly (*d*), the law of Canada at all; not even Imperial law; but the law of a foreign country. In accordance with that comity between nations, which is now recognized by the tribunals of all civilized countries, those tribunals do not, where the facts out of which the litigation arose occurred in a foreign country, limit the enquiry to what is the law which would govern in case those facts had occurred within its own territory. Indeed, in *criminal* matters, that is to say, where a person is being prosecuted for acts committed abroad, English courts have laid down the rule that such prosecution can only be had in the country where the crime was committed. The administration of international justice, if we may use the expression, is secured in such a case, by handing over the alleged offender to the officers of the country in which the offence is alleged to have been committed; and the jurisdiction of English tribunals has been limited to a preliminary enquiry as to the existence of a *prima facie* case. With regard to *civil* matters, the tribunals of most civilized states do not

(*b*) See *ante*, p. 172.

(*c*) See *ante*, p. 214.

(*d*) In a sense, the rules of international law are part of the jurisprudence of nearly every civilized state.

recognize any such local venue for their trial. It is beyond the scope of this work to enumerate the various conditions precedent to jurisdiction, laid down in the jurisprudence of the different civilized states, but in all such actions as the courts do entertain, they give effect to legal rights and obligations which may arise out of transactions occurring abroad; and it may happen, therefore, that any modern tribunal may be called upon, at times, to determine, and practically to administer, the law of a foreign country (e).

Every tribunal is, in a sense, subject to territorial limits of jurisdiction. It would be inconsistent with the sovereignty of the different states into which this world is divided, were the judgments of the courts of any one state enforceable, *proprio vigore*, in the others. But, even within the same state, the territorial jurisdiction of courts of law may be limited. Their jurisdiction, too, may be in many other ways limited and defined, by reason of the subject matter in litigation. Some courts may have jurisdiction over all classes of matters, and throughout the entire territory of the state; others again may have the same wide territorial jurisdiction, but may be restricted to matters of minor importance, or involving smaller amounts. But, however their jurisdiction may be limited, territorially or otherwise, there may arise for determination by them, cases in which the law to be applied is not law laid down by the power to which they owe their creation.

There is hardly any line of division founded upon the nature of the subject matter in litigation, which may not be, or has not been, adopted in some one country or another; but it is not of importance here to pursue this general inquiry further. It is of importance to note that, both in the United States and in Canada, the jurisdiction of a court may be, and in many cases in the former is,

(e) What is the foreign law in such cases is, in British jurisprudence, enquired into as a matter of *fact*, and must be proved by the evidence of experts versed in such foreign law.

limited to the adjudication of causes arising out of matters within the exclusive competence of one or other of the different legislative bodies existing therein. *As a question of jurisdiction*, therefore, in such case, it may be necessary to determine just where the line of division between the different legislatures, should be drawn. In this connection, we may note too, that it may—though not of course as a question of jurisdiction—devolve upon Canadian courts to determine like questions, as to the line of division between the federal and state legislatures in the adjoining Republic. It is, however, only in exceptional cases that the jurisdiction of a Canadian court of law will depend upon the determination of the line of division between the different Canadian legislative bodies (f). We have dwelt upon these different considerations in order to make clear that every court, by whatever authority created, or whatever its jurisdiction, territorially or otherwise may be, may be called upon to determine, and practically to administer, Imperial law, Dominion law, Provincial law, or even foreign law, in order to determine the rights of litigants.

*relations of facts.*  
Putting it broadly, a court of law may be said to be an organization created with a view to the determination of facts, and the exposition and enforcement of the law applicable to those facts, between parties who are at variance upon these points. In the performance of its duty, certain procedure has to be adopted, and a certain administrative staff has to be made part of this organization in order to secure the enforcement of the judgments of the court. Over these again may be established appellate courts. But whatever the details of the organization may be, and aside altogether from the question what government should create courts, or whether both Dominion and Provincial governments should have such power, it would seem expedient, to say the least, that the whole matter of the constitution of any given court should be in

(f) See *post*, p. 229.

the hands of one and the same government (g). If different parts of the machinery of any court are supplied to it by different authorities, it must necessarily be a very difficult matter to fix responsibility for a miscarriage of justice in any given case, unless the cause of such miscarriage can be definitely located, and be decisively assigned to some particular part of the machinery of the court.

The Imperial parliament, as the supreme power in government throughout the British Empire (h), may establish courts within the limits of any one of the colonies of Great Britain, and, as a matter of fact, we have, in Canada, Vice-Admiralty courts of Imperial creation, the jurisdiction of which is defined by Imperial statutes. What we must note is that in administering law within the sphere of their jurisdiction, these Vice-Admiralty courts are not limited to the enforcement of Imperial law, but must, should occasion arise (as it may in any court of law), expound and practically administer Canadian law (i). But, with the exception of the special class of cases which come before those courts, the administration of justice, using that term in its widest sense, in Canada, is left to courts of Canadian creation.

At the date of Confederation, there were in existence, in the different provinces, a large number of courts of law; and, for some years thereafter, the administration of justice throughout Canada was in the hands of these provincial courts, sec. 129 of the B. N. A. Act expressly providing that all laws *and all courts of civil and criminal jurisdiction*, and all legal commissions, powers, and authorities, and all officers, judicial, administrative and ministerial, existing in the different provinces at the Union, should continue as if the Union had not been made. Except, therefore, as

(g) See *post*, p. 234 and notes to B. N. A. Act, sec. 91, s-s. 27, and sec. 92, s-s. 14, and sec. 96, *et seq.*

(h) See Chap. IV., *ante*.

(i) *Redpath v. Allen*, L. R. 4 P.C. 511; see *ante*, p. 195.



otherwise provided in the Act (j), and subject to any changes which have since been made in the organization of these courts, the limits of their jurisdiction are, in principle, in no wise altered. Any alteration in the *jurisdiction* of these pre-Confederation provincial courts over matters within the legislative competence of the Parliament of Canada can, it is submitted, be effected only by Dominion legislation (k). Until so altered their jurisdiction *continues* "subject nevertheless . . . to be . . . altered by the Parliament of Canada or by the legislature of the respective province, according to the authority of the Parliament or of that legislature under this Act." It would unduly swell this volume if we were to attempt to enumerate these different courts, or to indicate their different jurisdictions. We may say, however, that there were in all the provinces, courts modelled upon the principle of the Superior Courts of law in England, whose jurisdiction territorially was limited only by the boundaries of the respective provinces in which they were established, and under these, and as a rule subordinate to them, were various other courts whose jurisdiction was limited as to the class of matters which might be entertained by them (without territorial limitation) (l), or was subject to limitations along both lines (m); but, it is almost unnecessary to say, there was no limitation of jurisdiction in any provincial court, along any line identical with, or in any sense analogous to, the line of division now existing between matters within the legislative competence of the Dominion parliament, and the provincial legislative assemblies, respectively.

If it be permissible to express an opinion as to what was anticipated by the framers of the B. N. A. Act, we

(j) See sec. 101 of the B. N. A. Act and notes thereto; also *post*, p. 229.

(k) See *re Boucher*, noted in Cassel's Dig. S. C. p. 181, and referred to in the judgment of MacMahon, J., in *Reg. v. Toland*, noted *post*, p. 236.

(l) *e.g.*, County Courts in Upper Canada.

(m) *e.g.*, Division Courts.

should say that (it was intended that, in the main, the administration of justice, throughout Canada, should be through the medium of these provincial courts, thus continued. This is clearly evidenced by the assignment to the provinces of the power to exclusively make laws in relation to "the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction" (*n*). As, however, cases would inevitably arise, involving consideration of the powers of the Dominion and Provincial legislatures respectively, and with a view, perhaps, to securing uniformity of decision on such important questions throughout the whole Dominion, the B. N. A. Act provides (section 101), that "the parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization, of a general Court of Appeal for Canada (*o*), and for the establishment of any additional courts for the better administration of the laws of Canada." The phraseology of the last clause of this section is a clear recognition of the fact that the provincial courts would necessarily be called upon to administer the laws of Canada (*p*) (as distinguished from the laws of the various provinces), and the provision was inserted with a view to the better administration of those Dominion laws through the medium of additional courts established by the Dominion government, should occasion arise. The jurisdiction of such additional courts, established by the Dominion government, must be a special jurisdiction, limited to cases arising out of those matters only which are within the competence of the Dominion parliament. This is the only case in Canadian jurisprudence where the jurisdictional line, if we may use

(*n*) B. N. A. Act, s. 92, s-s. 14.

(*o*) See R. S. C. c. 135. The Supreme Court of Canada was established by 38 Vic. c. 11 (Dom.), and became a court on January 11, 1876; see Reg. v. Taylor, 1 S. C. R. 65.

(*p*) See Resolutions Nos. 31 and 32, printed in Appx.

that expression, is co-incident with the line which divides the legislative powers of the Dominion and the provinces (*q*). The provinces, in establishing courts, may, but are not bound to adopt any such jurisdictional line. The Dominion is so limited except in the case of its "general Court of Appeal"—the Supreme Court of Canada.

What has taken place since Confederation, serves to support the view we have expressed as to what was anticipated by the Fathers of Confederation. The only additional courts which have been established by the Dominion government, are the Exchequer Court of Canada, and the Maritime Court of Ontario, each with a specially limited jurisdiction, sufficiently indicated by its name (*r*). But any duly created court, no matter by what authority created, or by what authority the different parts of its machinery may be supplied, may be called on to determine cases involving the application of either Dominion or Provincial law; and this observation applies even to the special courts of Dominion creation, for, although of limited jurisdiction as above indicated, incidental legal relations, depending upon provincial laws, may have to be determined in order to a decision in any given case.

Any government may take advantage of the actual existence within its territorial limits of an organized court of law, to impose on its judges and administrative staff duties (in relation to matters within its "sphere of authority") other than those imposed upon them by the power which created the court, and whether this action is to be

(*q*) See *ante*, p. 225-6.

(*r*) Note, however, *in re* The Bell Telephone Co., 7, O. R. 605; in which it was held by Osler, J.A., that a court or judicial tribunal was established by sec. 28 of the Patent Act of 1872, which provided that in case disputes should arise as to the validity of patents (in certain cases), such disputes should be settled by the Minister of Agriculture or his deputy, whose decision should be final; and that the constitution of such a court was *intra vires* of the Dominion parliament. See B. N. A. Act, sec. 91, s-s. 22. See, however, 9 O. R. 337. We should, perhaps, refer also to the Revising Officers' Courts under "The Electoral Franchise Act" as to which see *post*, p. 240.

considered as the creation of a new court, with the machinery of the old, or as the conferring of a new jurisdiction upon the old, seems to be considered by the Judicial Committee of the Privy Council, a matter of indifference (*s*). The question has come up in various ways, and the principle must now be considered as authoritatively established. As an extreme instance of its application, we may cite the case of Attorney-General v. Flint (*t*), in which it was held by the Supreme Court of Canada, that it was competent for the Dominion parliament to confer upon the Vice-Admiralty Court, existing in Nova Scotia under Imperial authority, jurisdiction to entertain proceedings for enforcing payment of penalties for breaches of the Inland Revenue Act. It appears to have been the opinion of some at least of the Judges of the Supreme Court, that a judge of a Vice-Admiralty court might decline to take upon himself the burden of such cases, but the jurisdiction so to do, they held to be beyond question. It cannot of course be doubted that if the Imperial parliament, in the exercise of its legislative supremacy, were expressly to prohibit such court from entertaining other than matters arising under Imperial legislation, such prohibition would be operative, but in the absence of such prohibition, it is difficult to see how, as Canadian citizens, the judges and staff of the court could lawfully decline to perform the duties imposed upon them by Canadian law (*u*).

Prior to Confederation, the decision of controverted election cases had been entirely in the hands of the different Provincial legislatures, and after Confederation the Dominion parliament exercised the same jurisdiction over

(*s*) Valin v. Langlois, 5 App. Cas. 115, passage quoted *post*, p. 232.

(*t*) 16 S. C. R. 707. See also "The Farewell," 7 Q. L. R. 380.

(*u*) "Judges as citizens were bound to perform all the duties which are imposed upon them by either the Dominion or Local Legislature"—*per* Dorion, C.J., in Bruneau v. Massue, 23 L. C. Jur. 60.



elections to the Dominion House of Commons; but in 1873-4, the Dominion parliament decided to transfer this jurisdiction to the provincial courts. Their power so to do was distinctly upheld by the Judicial Committee of the Privy Council, (affirming the decision of the Supreme Court of Canada) in the well-known case of *Valin v. Langlois (v)*, in which Lord Selborne in delivering the judgment of the Committee says:

“There is therefore nothing here to raise a doubt about the power of the Dominion parliament to impose new duties upon the existing provincial courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces.”

and he afterwards characterizes the distinction which was endeavored to be drawn between the Act of 1873, which entrusted the trial of election petitions to the judges of the Supreme Court, and the Act of 1874, which entrusted this jurisdiction to the provincial courts, as “but a nominal, a verbal, and an unsubstantial distinction.”

The validity of the Act, 31 Vic. c. 76 (Dom.), which provided for utilizing the machinery of the provincial courts for the taking of evidence for use before foreign tribunals, has been affirmed by the courts of both Ontario and Quebec (*w*).

Somewhat the same question arose in Ontario in the cases of *Wilson v. McGuire (x)*, and *Gibson v. McDonald (y)*. County Court judges in that province are appointed by the Dominion government (*z*). Division Courts existed in the various counties of that province prior to Confederation, and had always been presided over by the judge of the County Court of the particular county. By an Act of the

(v) 5 App. Cas. 115, affirming 3 S. C. R. 1.

(w) *In re Wetherell & Jones*, 4 O. R. 713; *Ex parte Smith*, 16 L. C. Jur. 140; and see notes to the opening clause of sec. 91 of the B. N. A. Act, *post*.

(x) 2 O. R. 118.

(y) 7 O. R. 401.

(z) B. N. A. Act, sec. 96.

Provincial Assembly (a), it was provided, in effect, that two or more counties might be grouped together for the purpose of facilitating the conduct of business in the Division courts of the grouped counties, and that the judges of the County courts of those counties might arrange for taking the work in rotation throughout the entire group. The validity of this Act was upheld in *Wilson v. McGuire* (b). In *Gibson v. McDonald*, it was held that a somewhat similar arrangement as to the General Sessions of the Peace in the different counties of Ontario, was invalid, and there is no doubt that the correctness of the earlier decision must be deemed somewhat impugned by this case. The point on which the latter decision rests, however, is the very narrow one, that the judge of the County Court of one county was sitting as Chairman of the General Sessions in another, "*and not otherwise than by virtue of his office as judge of the County Court of his own county*," and that this he had, under his commission, no right to do. Armour, C.J., expressly reserved the question as to the power of the provincial assembly to provide that the judge of the County Court of one county shall be Chairman at the General Sessions of the Peace in another, and the decision therefore only goes to this length, that a County Court judge can act *as such* only in the county for which he is appointed, by the Governor-General in Council, under section 96 of the B. N. A. Act. Taken together, these two cases support our proposition. A Provincial government can impose upon the individual who is County Court judge, duties (falling of course within the range of matters of provincial cognizance) other than those covered by his commission from the Governor-General, care being necessary perhaps in defining that those super-added duties

(a) R. S. O. (1877) c. 42.

(b) 2 O. R. 118, Armour, J., dissenting. It is to be noted that the majority of the Court expressly limited their judgment to affirming the validity of the Act, *in its bearing on Division Courts*.

are—when exercisable otherwise than in his own County Court—to be exercised by him, not quâ County Court judge, but quâ provincial officer.

With regard to the creation of courts by the Dominion Government, the scheme of the B. N. A. Act is logical, while as to those Provincial courts mentioned in section 96 of the B. N. A. Act, the scheme is quite the reverse. We do not rely upon any possible complication which may arise from the way in which “procedure” is treated by the Act (*c*). It is difficult, in many cases, to distinguish between law and “procedure.” In its narrow sense “procedure” relates simply to the organic working of a court, and is not supposed to affect rights, or to alter the legal relations arising out of any given facts; while in a wider sense it may have a most potent effect along both lines (*d*). Of this, however, more anon. The method of organizing those provincial courts mentioned in section 96 is illogical in this, that the machinery of those courts is supplied partly by the Dominion government and partly by the Provincial, with the resultant difficulty in fixing responsibility to which reference has already been made (*e*). The power to appoint, necessarily carries with it the power to determine the tenure of office (subject, as to the Superior Court judges, to section 99), and therefore the power to dismiss. This power of appointment and dismissal rests with one government; another government defines the duties of the office—an arrangement certainly unique under a British constitution. But, except in so far as this peculiar arrangement affects the law of our constitution, further comment upon it is, perhaps, out of place here.

However constituted, the Provincial courts have, we again repeat, to administer Dominion as well as Provincial law, and this is perhaps the proper place to advert more

(*c*) Compare s. 91, s-s. 27, and s. 92, s-s. 14.

(*d*) See *Exchange Bank v. Reg.*, 11 App. Cas. at p. 169.

(*e*) See *ante*, p. 227.

fully to the question of "procedure" alluded to in the last paragraph. On this question considerable divergence of view is apparent in the cases (*f*), arising largely from the differing constructions placed upon the words "procedure in civil matters in those courts" in section 92, sub-section 14. Taking that sub-section alone, and noting the sharp distinction drawn between criminal and civil jurisdiction, and that together they are exhaustive of the whole field, the plain meaning is, that "procedure," in all matters other than criminal, is subject to the exclusive legislative power of the provincial legislatures, and there would appear to be no warrant therefore for the opinion that "procedure in civil matters" in this sub-section must be read as limited to proceedings in relation to matters over which the provincial legislatures have exclusive legislative power (*g*). But what is "procedure"? We have already noted that the word is capable of two very different interpretations. It is only used once in section 91, and once in section 92, and a comparison of the two sub-sections in which it occurs will suffice to show that in sub-section 27 of section 91, it has the wide, and in sub-section 14 of section 92, the narrower meaning. "The criminal law . . . *including* the procedure in criminal matters," would indicate the view of the framers of the B. N. A. Act, that "procedure in criminal matters" is an essential and necessary part of criminal law; while "the constitution, maintenance, and organization of provincial courts, *including* procedure in civil matters," would appear to point to the "procedure" incident to the organic working of the courts. In a sense, statutory regulation of procedure in any, the most immaterial, step of a cause may affect rights and obligations,

(*f*) See notes to B. N. A. Act, s. 92, s-s. 14, where the cases are collected.

(*g*) See *Peak v. Shields*, 8 S. C. R. at p. 591. "Matters" is here used in two very different senses. "Civil matters," we take it, is but another way of saying civil actions, suits, or other judicial proceedings; while "matters over which, etc.," refers to subject matters for legislative action.



but only in a very secondary sense. No idea of altering those legal relations which arise from any facts irrespective of any litigation in reference thereto, is present to the mind of the legislature in laying down such statutory regulations, and it is this sort of "procedure" that is referred to in sub-section 14 of section 92; while as to criminal matters, "procedure," from the laying of the information to the infliction of the penalty, is carefully treated as a component part of criminal law, the various safeguards thereby created forming part of the "rights" of persons accused of crime (*h*). So far as procedure is of this sort—a necessary and practically component part of legislation relative to any of the classes of matters within the competence of the Dominion parliament—it is an accessory which follows its principal.

The cases under the B. N. A. Act bear us out, we think, in this distinction. As to criminal law, section 91, sub-section 27, is a clear indication that "procedure in criminal matters" is such component part of that law, although, as will appear later, (the term "criminal law" in Canadian jurisprudence is a term of limited scope; but as to laws relating to matters other than crimes, a perusal of the various sub-sections of section 91 discloses many matters, any legislation on which must involve procedure,—of which matters, procedure is a component part. Maritime law is a branch of jurisprudence which falls within "Navigation and Shipping" (*i*), and its peculiarly peremptory *in rem* procedure is an essential part of any such law, practically creative of rights and obligations. And so of divorce law, patent law (*j*), insolvency law, and election law; and

(*h*) Since the above was written Mr. Justice McMahon has handed out his judgment in *Reg. v. Toland*, holding that 53 Vic. c. 18, s. 2 (Ont.), giving to a police magistrate power to try certain offences under R. S. C. c. 165, "An Act respecting Forgery," is *ultra vires* of a provincial legislature. (*i*) Sec. 91, s-s. 10; see "The Picton," 4 S. C. R. 648.

(*j*) See *In re The Bell Telephone Co.*, 7 O. R. 605, cited in foot note *ante*, p. 230. *Aitcheson v. Mann*, 9 P. R. 253, 473.

perhaps other branches of jurisprudence may be found wrapped up in the various sub-sections of section 91. The leading cases on the subject are those involving consideration of insolvency law and election law. The extent to which the Dominion parliament, by legislation under sub-section 21 of section 91, "bankruptcy and insolvency," is empowered to interfere with "procedure in civil matters in the province," came up for consideration before the Judicial Committee of the Privy Council, in the case of *Cushing v. Dupuy* (k), and was disposed of in the judgment of that tribunal in these words:

"It was strongly contended that the parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of the province. The answer to this objection is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the original rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. *Procedure must necessarily form an essential part of any law dealing with insolvency.* It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, so far as a general law relating to those subjects might affect them."

The power of the Dominion parliament to regulate the procedure in connection with the trial, by provincial courts, of controverted election cases, arising out of elections to the House of Commons, has scarcely been questioned. The language of the Judicial Committee of the Privy Council, in *Cushing v. Dupuy*, applies *mutatis*

(k) 5 App. Cas. 409.

*mutandis* to legislation upon this subject, which by section 41 of the B. N. A. Act, is clearly with the Dominion parliament (*l*). The controversy which has arisen as to the power of the Dominion parliament to refer such cases for determination by provincial courts, has been settled in affirmance of the power (*m*).

So far as provincial courts are concerned, the provincial legislatures have full control of them, subject only to the appointing power of the Dominion government in reference to those mentioned in section 96 of the B. N. A. Act—the Superior, District, and County Courts in each province, excepting the Probate Courts of Nova Scotia and New Brunswick—and to the power of the Dominion parliament to regulate the procedure in the sense above explained. This jurisdiction over provincial courts is not limited to those which were in existence at the Union, but extends to the creation of such new provincial courts (*n*), with such jurisdiction, and with such judicial and administrative staff, as to the provincial legislature may seem proper for “the administration of justice in the province,” which phrase is used in its widest sense. It covers the appointment of all officers connected with the administration of justice (*o*), with the exceptions noted. The question has been much discussed in connection with the appointment of police magistrates and justices of the peace, and has been complicated somewhat by considerations as to the prerogatives of the Crown in this connection. With this phase of the question we have already dealt (*p*). It is now settled, subject to review by our Supreme Court, and the Judicial Committee of the Privy Council, that the

(*l*) See notes to that section, *post*.

(*m*) See *ante*, pp. 231-2, and notes to s. 41 of the B. N. A. Act, *post*.

(*n*) Reg. v. Coote, L. R. 4 P. C. 599; Ganong v. Bayley, 1 Pug. & Burb. 324.

(*o*) Reg. v. Bush, 15 O. R. 398, *per* Street, J. See passage quoted *post*.

(*p*) See Chap. VI., and Chap. VIII. *ante*, p. 165.

appointment of justices of the peace and police magistrates, relates to "the administration of justice" (which term is to be read in its broad sense, and qualified only by the power of the Dominion parliament under sections 96 and 101), and rests therefore with the provinces. The situation is thus summed up by Armour, C.J., in *Reg. v. Bush* (q):

"Laws providing for the appointment of justices of the peace are, it is contended, and I think rightly, laws in relation to the administration of justice, for the appointment of justices of the peace is a primary requisite to the administration of justice; and if this contention be correct the passing of such laws is exclusively within the power of the provincial legislatures.

"There is a considerable weight of judicial opinion in favor of this contention, and although not binding upon us, yet in a matter of construction such as this, it ought not to be lightly dissented from."

And he refers to a number of authorities, which will be found collected in the notes to section 92, sub-section 14. Mr. Justice Street says, referring to the language of sub-section 14:

"Now, these words, standing alone and without any interpretation or context, appear to me to be sufficient, had no other clause in the Act limited them, to confer upon the provincial legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the provinces, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters."

And he refers to sections 96, 100, and 101 as the only sections in any way limiting the meaning to be given to sub-section 14, and then proceeds:

"Everything coming within the ordinary meaning of the expression, "the administration of justice," not covered by the sections which I have referred to, therefore, remains, in my opinion, to be dealt with by the provincial legislatures, in pursuance of the powers conferred upon them by paragraph 14 of section 92."



In *re Simmons and Dalton* (*r*), it was held by Mr. Justice Proudfoot that the High Court of Justice for Ontario—the “Superior Court” of that province—has jurisdiction to supervise the exercise of judicial functions by a “federal” Court—*e.g.*, the Revising Officers Court under “The Electoral Franchise Act” (R. S. C. c. 5)—but this decision has been overruled by the Divisional Court of the Chancery Division (*s*).

“The Chancery Division has, in common with the other divisions of the High Court of Justice, plenary jurisdiction to deal with matters of prohibition *which concern the administration of justice within Ontario as a provincial unit*. This (inherent) power is circumscribed by the requirements of the province, and operates, I think, only as to *laws enacted by or in force in Ontario pertaining to matters of provincial cognizance under the B. N. A. Act*.”—*Per* Boyd, C.

Courts, or judicial tribunals, established under Dominion legislation—limited as their functions must be to administering *Dominion* law (*t*)—are entirely outside of “the administration of justice in the Province,” and “are not subordinate judicial Courts *quoad* the Province.” (*u*).

(*r*) 12 O. R. 505.

(*s*) *re* North Perth, 21 O. R. 538.

(*t*) See *ante*, p. 229.

(*u*) 21 O. R. at p. 543; see further on this subject, notes to s. 41 of the B. N. A. Act, *post*.

mtl.

X CHAPTER XII. - 306 pp.

THE B. N. A. ACT, 1867,  
30-31 VIC. CAP. 3.

An Act for the Union of Canada, Nova Scotia, and  
New Brunswick, and the Government thereof  
and for Purposes connected therewith.

[29th March, 1867.]

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire (i) to be federally (ii) united into one Dominion under the Crown of the United Kingdom (iii) of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom (iv):

(i) "*Have expressed their desire.*"—This expression of desire is to be found in the Quebec Resolutions, which will be found printed in full in the appendix. See *ante*, p. 2.

(ii) "*Federally.*"—The use of this term would seem to imply the continued existence of the parties to the *foedus*. See chapter III., *ante*, p. 47; and see also the judgment of the Privy Council in *Liquidators of Maritime Bank v. Receiver-General of New Brunswick* (a).

(a) At present only reported in Times Law Reports for week ending 6th July, 1892 (Vol. VIII., p. 677).

(iii) "*Under the Crown of the United Kingdom.*"—See notes to section 2, *post*; and see also, as to the necessary saving of Imperial sovereignty in colonial legislation, chapter IX., *ante*, p. 183, *et seq.*

(iv) "*A constitution similar in principle, etc.*"—For a comparison and contrast of our system of government, with those of the United Kingdom and the United States, see chapter I. As to the limitation of this preamble to the Dominion government only, and the harmlessness of such limitation, see *ante*, p. 3, and chapter III. It is submitted, however, that read in connection with clause 3 of this preamble, it should be treated as a general reference to the type of governmental machinery, and its working principle throughout both the Dominion and the various provinces.

And whereas such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire :

And whereas on the establishment of the Union by authority of Parliament (i) it is expedient, not only that the Constitution of the Legislative authority (ii) in the Dominion be provided for, but also that the nature of the Executive Government (iii) therein be declared :

(i) "*By authority of parliament.*"—As to the legislative supremacy of the Imperial parliament over Canada, in common with all other parts of the British Empire, see chapter IV. In the early days of our colonial history provinces were divided, and again joined together by the Crown in the exercise of "prerogative," but as representative legislatures were in existence in the pre-Confederation provinces, any attempt to effect their union otherwise than by Act of the Imperial parliament would have been illegal.

See *ante*, p. 30, and chapter VI. *ante*, p. 140; and see also notes to section 3, *post*.

(ii) "*The legislative authority in the Dominion.*"—As to the control exercised by the executive department of the Imperial government over Dominion legislation, see chapter VII. *ante*, p. 145, where will be found a full discussion of sections 55, 56 and 57 of the B. N. A. Act. As to colonial legislative authority and the limitations thereon, see chapter IX.

(iii) "*The nature of the executive government.*"—As to the necessary co-extension and practical oneness of the spheres of authority of the legislative and executive departments of government, see *ante*, p. 12 *et seq.*, 22 *et seq.*, 45 *et seq.*, and chapter VI. See also notes to section 9, *post*.

And whereas it is expedient that provision be made for the eventual admission into the Union of other parts of British North America (i):

(i) "*The eventual admission of other parts of British North America.*"—See sections 146 and 147, *post*, and Part IV. of this book.

Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

#### I.—PRELIMINARY.

1. This Act may be cited as "The Short Title. British North America Act, 1867" (i).



(i) Throughout this work we have adopted the shorter mode of citation, "the B. N. A. Act." It should be pointed out, however, that there are two other Acts similarly entitled, namely, the B. N. A. Act, 1871 (*b*), and the B. N. A. Act, 1886 (*c*). By section 3 of the last-named Act, these three statutes are to be construed together, and may be cited as "The British North America Acts, 1867 to 1886." We draw attention, too, to "The Parliament of Canada Act, 1875 (*d*), as to which, see notes to section 18, *post*."

Application of provisions referring to the Queen.

2. The provisions of this Act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland (i).

(i) "*Kings and Queens of the United Kingdom*."—The succession to the Crown of England is now regulated by the Act of Settlement, 12 & 13 Wm. III. c. 2. By the common law of England, upon the abdication of a sovereign, parliament might re-settle the succession, and in comparatively modern times we have the precedent of the Bill of Rights, 1 Wm. & Mary (st. 2), c. 2, by which it was declared that, by his flight from the kingdom, James II. had abdicated the throne, and the crown was settled upon William and Mary. Then came the Act of Settlement, to which we have referred, settling the succession upon the Electress Sophia, of Hanover, and her heirs, being Protestants. The power of parliament to alter the succession is distinctly affirmed in 6 Anne, c. 7, which adjudges traitors all who affirm "that the kings or queens of this realm, with and *by the authority of* parliament, are unable to make laws and statutes of sufficient force and validity to limit and bind the Crown and *the descent, limitation, inheritance, and government thereof*." While, as we have frequently pointed

(*b*) 34 & 35 Vic. c. 28 (Imp.); see *post*.

(*c*) 49 & 50 Vic. c. 35 (Imp.); see *post*.

(*d*) 38 & 39 Vic. c. 38 (Imp.).

out, colonial legislatures have full power to curtail the prerogatives of the Crown in connection with the executive government of a colony (*e*), this does not extend to enable a colonial legislature to pass an Act affecting the position of the occupant of the throne of England as Executive Head throughout the Empire; see *Craw v. Ramsay*, cited *ante*, p. 184. See s. 9, *post*, and notes thereto.

## II.—UNION.

3. It shall be lawful (i) for the Queen, <sup>Declaration of Union.</sup> by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation (ii) that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three Provinces shall form and be one Dominion (iii) under that name accordingly.

(i) "*It shall be lawful.*"—See note (i) *ante*, p. 242; the Proclamation of Union rests upon the express "authority of Parliament," as intimated in the preamble.

(ii) Her Majesty's Proclamation bore date 22nd May, 1867, and provided that the Union should take effect on July 1st of that year.

(iii) "*One Dominion.*"—*i.e.*, for all purposes of government, legislative and executive, in relation to matters of common concern, leaving the component provinces their full rounded autonomy in all other matters. "The object of the Act was neither to weld the Provinces into one, nor

(*e*) See *ante*, p. 140; *Exchange Bank v. Reg.*, 11 App. Cas. 157; *Liquidators of Maritime Bank v. Receiver-General of New Brunswick*, Times Law Rep., Vol. VIII., p. 677.

to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, intrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.”—*Per* Lord Watson, in *Maritime Bank v. Receiver General of New Brunswick*, Times L. R., Vol. VIII. p. 677. See the judgment quoted more at length in notes to section 58, *post*.

Construction  
of subsequent  
provisions of  
Act.

4. The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the day appointed for the Union taking effect in the Queen's Proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act (i).

(i) “*Canada as constituted under this Act.*”—This Act must now be read in connection with the various Imperial “Orders in Council,” passed under section 146, *post*, and having, under that section, the force of Imperial statutes; and with the Acts in amendment of this Act. See note to section 1, *ante*.

Four Provinces.

5. Canada shall be divided into four Provinces (i), named Ontario, Quebec, Nova Scotia, and New Brunswick.

(i) “*Four Provinces.*”—For the boundaries of the Dominion, and of each of the different provinces of which it is now composed, see Houston, “Constitutional Documents of Canada,” appendix B, p. 271. At the date of Confederation, there were in existence in British North America three other provinces, namely, Newfoundland, Prince Edward Island, and British Columbia; the balance of the territory

being unorganized, except in so far as the government of the Hudson's Bay Company in Rupert's Land might be deemed an organized government. Newfoundland has so far declined all invitations to unite her fortunes with the Dominion, although she was one of the provinces represented at the Quebec Conference. Prince Edward Island and British Columbia have since joined, and the remainder of British North America has been annexed to Canada, and the province of Manitoba erected therein, so that there are now seven "provinces" in the Dominion, exclusive of the North West Territories. See Part IV. of this book.

6. The parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces (i). The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec (ii).

Provinces of  
Ontario and  
Quebec.

(i) "*Two separate provinces.*"—See Quebec Resolutions, No. 2. Although joined in legislative union under Imperial Act, 3 & 4 Vic. c. 35 ("The Union Act"), the difference in race, language, and legal systems justified the popular description of the two parts of old Canada as "the two Canadas." For an interesting sketch of the devices resorted to, in order to work out the federal idea in the government of these two parts of Canada, see Bourinot, "Parliamentary Procedure and Practice," 2nd ed. p. 39, *et seq.* The necessity, created by this severance of the two Canadas, for the establishment of new governmental machinery in each of them, and the argument founded on the clauses of



the Act which make provision therefor, will be found discussed in chapter III. *ante*, p. 46.

(ii) See the judgment of Robinson, C.J., in *Doe d. Anderson v. Todd* (quoted *ante*, p. 104) for a statement in reference to the boundaries of (old) Quebec.

Provinces of  
Nova Scotia  
and New  
Brunswick.

**7.** The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act (i).

(i) See foot-note *ante*, p. 46.

Decennial  
census.

**8.** In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four Provinces shall be distinguished (i).

(i) "*Shall be distinguished.*"—In order to a re-adjustment of the representation, in the parliament of Canada, of the respective provinces. See section 51, *post*, and notes thereto.

### III. EXECUTIVE POWER (i).

Declaration of  
Executive  
Power in the  
Queen.

**9.** The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen (ii).

(i) "*Executive power.*"—As to the necessary subordination of the executive to the legislative department of government, see *ante*, p. 12. In reference to the government of Canada as part of the British Empire, the Queen's authority as executive head of that Empire is subordinate to the parliament of the United Kingdom, the supreme Imperial legislative power; and her authority as executive

head of Canada (*that is in reference to our self-government*) is subordinate to the authority of Canadian parliaments. In other words, in so far as the Imperial parliament has reserved to itself, control over certain subject matters, as being matters of Imperial concern (such reservation being evidenced, either by express or implied limitation upon the powers of the colonial legislature over certain subject matters (*f*), or by the existence of Imperial legislation upon these matters) (*g*), the executive authority of the Queen is exercised subject to the control of the Imperial parliament, *i.e.*, by and with the advice of the executive committee or Cabinet of the Empire; while, on the other hand, in so far as legislative power has been conceded to a colonial legislature, the executive authority of the Queen is exercised, through her representative, subject to the control of the colonial legislature, *i.e.*, by and with the advice of the executive committee or Cabinet, Dominion or Provincial, as the case may be. We may here notice one particular subject matter, which for obvious reasons is treated as matter of Imperial concern, and in respect to which, therefore, no legislative power is conceded to Canadian parliaments; the constitution, namely, of the connecting links in the chain of executive government, from the Imperial, through the Dominion, to the Provincial. The executive government of the British Empire is, in truth, in its Imperial, as well as its English aspect, a unit; and for the purpose of securing unity of national purpose and method throughout the Empire, the appointment of the local executive heads is so arranged that the executive department of that government which is possessed of the widest territorial jurisdiction, appoints the executive head of the government next in extent, and exercises executive supervision over its legislation; and so on. We may here note that the Imperial government can also exercise a *legislative* supervision over colonial legislation; the Dominion government is limited to the exercise

(*f*) See Chap. IX.

(*g*) See Chap. IV.

of *executive* supervision—to wit, the power of disallowance—over provincial legislation. Leaving out of consideration, however, the legislative supremacy of the Imperial parliament, what the Judicial Committee has said (*h*) in reference to the relation between the Dominion and the Provinces, in Canada: “No one of the parts can pass laws for itself except under the control of the whole, acting through the Governor-General:” is equally applicable—substituting the Queen for the Governor-General—to the relation of the colonies generally to the Empire.

Under existing arrangements, the Queen occupies a dual position, being executive head of the Empire and, at the same time, local executive head of the United Kingdom; but the union, in one legislative body with one executive committee or cabinet, of the power to legislate for the whole Empire as well as specially for one of its territorial divisions, leaves the line of division a purely “conventional” one—in this sense, at least; that the power of the Imperial parliament to alter the position of the line, is restrained only by the “conventions,” and not by the law of the constitution; but at any given moment of time the line of division is a legal one. See *ante*, p. 11.

The Governor-General of Canada again occupies a dual position. He is one of the Imperial executive staff as well as executive head of the Dominion. In the former capacity, he is subject to Imperial executive authority, which, as we have said, extends to all those subject matters, which, at any given moment of time, are within the category of matters of Imperial concern, controlled by Imperial legislation, or—from the other point of view—uncontrollable by colonial legislation. In regard to such matters his actions are regulated by instructions, general or specific, received from his official superior at home or by Imperial statutes. In his capacity as executive head of the Dominion, he acts by and with the advice of the Queen’s Privy Council for Canada, and is, in the exercise of his executive

(h) *Bank of Toronto v. Lambe*, 12 App. Cas. at p. 587.

authority in relation to matters within the legislative competence of the Dominion parliament, subject to the control of that body. His position with reference to the Lieutenant-Governors of the several provinces, illustrates the distinction we have been trying to point out. The Dominion parliament cannot provide any method for the appointment of a Lieutenant-Governor, or for his removal, other than that provided in the B. N. A. Act. It is deemed matter of Imperial concern that there should be a single executive head for each of the provinces; that the Dominion executive committee or cabinet should appoint him; and that, once appointed, he should not be removed except for cause. Any departure from the mode provided in the B. N. A. Act would be illegal and nugatory, and (in performance of his duties in this connection, the Governor-General must, as an Imperial officer, follow the Imperial statute, as that statute may be authoritatively interpreted by his official superior in England. As to the mode of appointment, the B. N. A. Act is explicit—the appointment must be by order in council—so that the question, who shall fill the position, is left as a matter of local Canadian concern, to the determination of the Dominion Cabinet; while as to the removal of a Lieutenant-Governor, the B. N. A. Act is equally clear in giving that power to the Governor-General alone. That is to say, the Governor-General cannot, alone, legally appoint, but he can, alone, legally remove for cause. This question is perhaps not of much practical importance, because, in the Letellier case, the Imperial authorities laid down the “conventional” rule for the guidance of the Governor-General, that he should, in this matter of removal, act by and with the advice of the Dominion cabinet; but should he at any time undertake to act upon his own judgment a Lieutenant-Governor removed would legally cease to be Lieutenant-Governor. The laying down of this conventional rule has certainly very largely increased the power possessed by the Dominion executive to interfere in the affairs of the provinces; but it was necessary, per-



haps, to the logical uniformity of the federal scheme. It is perhaps more consonant with British notions to have the real power coupled with real responsibility to the whole electorate of the Dominion, in whose interests presumably the power will be exercised in any given case. A political cynic may perhaps think not *mal apropos* the remark of Mr. Bumble when informed that a husband is, in law, presumed to control his wife: "If the law presumes anything of the sort, the law's a fool—a natural fool." It is indeed a serious question whether it would not be conducive to the impartiality of the provincial executive heads to make them entirely independent of Dominion executive authority; or whether any gain along this line would not be more than counterbalanced by the loss of one item of colonial self-government. See notes to section 58, *post*.

(ii) "*In the <sup>King</sup> Queen*"—This section is declaratory merely, and was inserted simply by way of abundant caution, for, according to Chitty, "the king of England is not only the chief, but properly the sole magistrate of the nation, all others acting by commission from, and in due subordination to him" (*hh*). In an earlier chapter we have treated at some length of the prerogatives of the Crown in their relation to colonial government,—see chapter VI.; and we have endeavored to emphasize this legal principle that these prerogatives of the Crown are nothing more than powers vested by the common law of England in the executive head of the nation in aid of the execution of the laws of the realm, and that, by Act of parliament, these prerogative rights may be, and in a great many instances have been modified—turned into statutory powers—or entirely withdrawn. The question has been mooted, although perhaps not of such practical importance, whether Her Majesty could, in person, carry on the government of Canada, or of one of the provinces; it is submitted that

(*hh*) See the judgment of the P. C. in *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick*, as yet reported only in *Times L. R.*, Vol. VIII. p. 677.

without repeal of the B. N. A. Act, she could not legally do so. All the powers, authorities and functions necessary to "carrying on the government" of the Dominion and of the respective provinces are, by the express terms of the B. N. A. Act, vested in the Governor-General, or the Lieutenant-Governor, as the case may require (*i*); and by no Act of Imperial *executive* authority could these express provisions of this Imperial statute be overridden. In the absence, therefore, of further Imperial legislation, we must put up with Her Majesty's representatives.

The power (1) to disallow colonial legislation; (2) to appoint the Governor-General; (3) to appoint a Commander over the military and naval forces of Canada; (4) to make international arrangements which will bind Canada; and (5) to hear appeals from Canadian courts in her Privy Council (*j*); would seem to be about all the common law prerogatives of the Crown in connection with colonial affairs, over which colonial legislatures have no legislative power. As a matter of fact, some of these powers can hardly be designated prerogatives of the Crown, as their exercise is entirely controlled by Imperial statutes. As one example, we may note the power to disallow Dominion legislation, which under section 56 of the B. N. A. Act, can only be exercised within two years from the receipt of the Act by the secretary of state, and by order in council.

**10.** The provisions of this Act referring to the Governor-General (*i*) extend and apply to the Governor-General for the time being of Canada, or other the chief executive Officer or Administrator, for the time being carrying on the govern-

Application of provisions referring to Governor-General.

(*i*) See notes to ss. 10 and 62, *post*.

(*j*) *Cushing v. Dupuy*, 5, App. Cas. 409, and cases there cited; and see *Théberge v. Landry*, 2 App. Cas. 102 (as to appeals in election cases under the Quebec Acts of 1872 and 1875), noted *post*, under s. 41.

ment (ii) of Canada on behalf and in the name of the Queen (iii) by whatever title he is designated.

(i) "*The Governor-General.*"—We have already devoted one chapter of this book to a consideration of the position of the Governor-General, and need not therefore make further reference to that office here. As was pointed out, the B. N. A. Act contains no express provision for his appointment. By R. S. C. c. 3, he is a "corporation sole."

(ii) "*Carrying on the government.*"—Compare with this section, the language of section 62 in reference to the carrying on of the government of the respective provinces by the Lieutenant-Governors. The use of this phrase in reference alike to the Dominion and the Provincial governments, has been much utilized in argument in support of the contention that the Lieutenant-Governor is within his sphere, an officer clothed with authority as complete as that of the Governor-General; but as we shall have to deal with this matter more at length when we come to deal with the office of Lieutenant-Governor, we need not stay to consider it at length here. See notes to section 58, *post*.

(iii) "*On behalf and in the name of the Queen.*"—The absence of this phrase from section 62, has been utilized in the opposite direction in *Regina v. Amer (k)*, and other subsequent cases. It was laid down by Harrison, C.J., that the Governor-General is the only executive officer provided for by the B. N. A. Act, who answers the description of "representative of the Queen," but it is submitted that the difference in the wording of this section and of section 62, does not warrant any such distinction. Any person carrying on government within the British Empire must do so on behalf of, and in the name of, the executive head of the British Empire, as all other executive magistrates act under commission from, and in due subordination to, that executive head. If reliance is placed upon the fact that



the Lieutenant-Governor is described as an "officer," it will be seen that this section uses the very same word in describing the position of the Governor-General, and a reference to chapter VIII. and the cases there collected, will show that the Governor-General occupies, in this respect, a position in no way different from, or superior to, that of the Lieutenant-Governor of a province. Very opportunely, there comes to hand the report of the judgment of the Judicial Committee of the Privy Council in *Liquidators of the Maritime Bank v. Receiver General of New Brunswick* (Times L. R., Vol. VIII. p. 677), which authoritatively establishes the doctrine that (the position of the Governor-General and the various Lieutenant-Governors is, in principle, precisely analogous. "A Lieutenant-Governor when appointed is as much the representative of her Majesty *for all purposes of provincial government* as the Governor-General himself is *for all purposes of Dominion government*." See further on this subject, section 58, *et seq.* and notes.

11. There shall be a Council (i) to Constitution of Privy Council for Canada. aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada (ii); and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor-General.

(i) "*There shall be a council.*"—Compare with this, the language of section 63. This latter section seems to "take it for granted" that an executive council would be called into existence in Ontario and Quebec, while as to the Dominion it was necessary to make express provision therefor. See *ante*, p. 50-1.



(ii) "*The Queen's Privy Council for Canada.*"—Following the English practice,\* members of the Canadian Privy Council, are not removed from their position upon the resignation of the "ministry" of which they may happen to be members; but, of course, those members only who are of the cabinet are summoned to meetings of the Privy Council. See Bourinot, "Parl. Proc. and Pract.," 2nd ed. p. 54 and Todd, "Parl. Gov. Brit. Col.," p. 42.

All powers  
under Acts to  
be exercised  
by Governor-  
General with  
advice of  
Privy Council  
or alone.

**12.** (i) All powers, authorities, and functions (ii) which under any Act (iii) of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor-General, with the advice or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor-General individually, as the case requires, subject nevertheless

(except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) (iv) to be abolished or altered by the Parliament of Canada (v).

(i) We have already had occasion to treat with some fullness of this section and its companion section (65); see chapter III., pp. 48, *et seq.*

(ii) "*All powers, etc.*"—Compare the language of section 65, which vests these same "powers, etc.," so far as they are capable of being exercised in relation to the government of Ontario and Quebec, in the Lieutenant-Governors of those provinces respectively. The B. N. A. Act affects no division of these powers, but of the field for their exercise merely.

(iii) "*Under any Act.*"—This section 12, refers only to statutory powers and does not touch the common law "prerogatives of the crown." The vast majority of the powers exerciseable by the Governor-General are statutory powers, that is to say, are vested in him under Canadian legislation. See chapter VIII. *ante*, p. 163, *et seq.*, where this question is fully discussed.

(iv) "*Except with respect, etc.*"—There are no Imperial Acts conferring powers, authorities, and functions on colonial governors generally: as to Canada, see the Constitutional Act, 1791, and the Union Act, 1840. All the powers, etc., conferred by those Acts—and more—are included in the B. N. A. Act, which at the present time is the only Imperial statute which in any way defines the duties of the Governor-General or of the Lieutenant-Governors of the various provinces.

(v) "*To be abolished or altered by the parliament of Canada.*"—This of course is limited to the abolition or alteration of these powers, etc., so far as they are exerciseable in

relation to the government of Canada. See section 65, which confers like power on the provincial legislative assemblies, so far as these powers are exerciseable in relation to the government of the provinces of Ontario and Quebec. See also notes to section 129, *post*, with particular reference to *Dobie v. Temporalities Board*, L. R. 7 App. Cas. 136.

Application of provisions referring to Governor-General in Council.

**13.** The provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada (i).

(i) Compare section 66, and see chapter VIII *ante*, p. 167, *et seq.*, for a reference to those matters in respect of which the Governor-General, in contemplation of law, acts alone.

Power to Her Majesty to authorize Governor-General to appoint Deputies.

**14.** It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor-General from time to time to appoint any person or any persons jointly or severally to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the Governor-General such of the powers, authorities, and functions of the Governor-General, as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power, authority or function (i).

(i) The commission to Lord Monck (clause 8), and the Letters Patent of 1878 (clause 6), expressly authorize the appointment, by the Governor-General, of a deputy. See chapter VIII. *ante*, p. 168. In the case of *Regina v. Amer (l)*, which came before the court upon a case stated, a commission to hold an assize, attested in the name of “———, Deputy of the Governor-General of Canada,” was referred to in the “case,” and Harrison, C.J., assumed :

“That the Queen authorized the appointment of a Deputy Governor, and that the prerogative power in question was conferred by the Governor-General upon the Deputy Governor, without any limitation or direction on the part of the Queen, and so that it has been exercised by the proper authority,”—

there being no statement to the contrary in the case. In that case, commissions had been issued both by the Governor-General, and by the Lieutenant-Governor, and the judgment of the Court affirmed the authority of the Governor-General to issue such commission; but it is submitted that the power to exercise this prerogative is properly with the Lieutenant-Governor, and not with the the Governor-General—so far at least as provincial courts are concerned—as it is a prerogative directly connected with “the administration of justice in the province,” and therefore falls within the class of matters over which a provincial legislature is exclusively entitled to exercise legislative authority. See B. N. A. Act, s. 92, s-s. 14. ✓

As to the appointment of a Deputy Lieutenant-Governor, see notes to section 67, *post*.

**15.** The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen (i). Command of armed forces to continue to be vested in the Queen.

(i) This is one of those matters in respect of which colonial legislative power is subject to many restrictions



arising from the existence of Imperial legislation of express colonial application. See chapter IX. *ante*. So far as such legislation does not extend, the subject is, as between the Dominion and the provinces, exclusively with the former: see B. N. A. Act, section 91, sub-section 7, and notes thereto. Our legislation upon the subject is contained in R. S. C. c. 41, to which the reader is referred, as the subject is beyond the scope of this work—political rather than legal.

7  
Seat of Gov-  
ernment of  
Canada.

**16.** Until the Queen otherwise directs, the seat of Government (i) of Canada shall be Ottawa (ii).

(i) "*The seat of government.*"—Compare section 68, where the same form of expression is used in reference to the provincial capitals. This fact, too, strongly supports the view that the position of the provinces is the same, in principle, as that of the Dominion.

(ii) "*Ottawa.*"—This city is wholly within the boundaries of the province of Ontario. See the powerful speech of Mr. C. Dunkin, in favor of placing the Federal capital entirely under the jurisdiction of the Federal government, just as the District of Columbia (within which is situated the city of Washington) is under the control of the Federal government of the United States.—Confed. Deb. p. 507.

#### IV.—LEGISLATIVE POWER. (i).

Constitution  
of Parliament  
of Canada.

**17.** There shall be one Parliament (ii) for Canada, consisting of the Queen (iii), an Upper House, styled the Senate (iv), and the House of Commons (v).

(i) "*Legislative power.*"—See chapter IX., *ante*, for a full discussion of the extent of the legislative power of a British colony.

(ii) "*Parliament.*"—The use of this term in reference to the legislative body of the Dominion only, has been much utilized in argument to belittle the position of the provincial legislative assemblies; but their co-ordinate rank with the Dominion parliament (each supreme within its sphere of legislative authority) is now finally established: *Hodge v. Reg.* 9 App. Cas. 117; *Bank of Toronto v. Lambe*, 12 App. Cas. 575; *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick*, Times L. R. Vol. VIII. p. 677. The appellation bestowed upon any of these bodies is immaterial. The question is, have they *legislative* powers in the proper sense of that term?

(iii) "*The Queen.*"—The position of the Queen as a constituent branch of parliament will be found discussed in chapter VI. *ante*, p. 132, *et seq.*, where we have also pointed out that the Crown is also a constituent branch of every colonial legislature. As to the position, in this regard, of the legislative assemblies of the province, see notes to section 69, *post*.

(iv) "*The Senate.*"—See section 21, *et seq.*

(v) "*The House of Commons.*"—See section 37, *et seq.*

**[18.** The privileges, (ii), immunities, and powers (iii), to be held, enjoyed and exercised by the Senate and by the House of Commons and by the members thereof respectively shall be such as are from time to time defined by Act of the Parliament of Canada (iv), but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House (v) of Parliament of

Privileges, &c  
of Houses (i).

[the United Kingdom of Great Britain and Ireland and by the members thereof.]

(i) The section, as it originally stood, limited the power of the Parliament of Canada to defining its privileges, etc., by its own enactment, "but so that the same shall never exceed those at the passing of *this* Act, held, enjoyed, etc."

In 1873, the parliament of Canada passed an Act, 36 Vic. c. 1, "To provide for the examination of witnesses on oath by committees of the Senate and House of Commons in certain cases." At the date of the passage of the B. N. A. Act, the committees of the Imperial "Commons House" had no power to examine witnesses upon oath (although they had been given (*m*) that power prior to 1873), and for this reason the Dominion statute was disallowed by the Imperial Privy Council. The Act had been passed in order to facilitate enquiries into what is popularly known as the "Pacific Scandal," and its disallowance created some excitement. The result of negotiations with the Imperial authorities (*n*) was the passage of "The Parliament of Canada Act, 1875," 38 & 39 Vic. c. 38 (Imp.), which substituted the section, as above printed, for the original section 18 of the B. N. A. Act, 1867. It also expressly validated 31 & 32 Vic. c. 24 (Dom.), "An Act to provide for oaths to witnesses being administered in certain cases for the purpose of either House of parliament," as to the validity of which doubts had been expressed. "The Parliament of Canada Act, 1875," contains no further legislation than as above noted, and it is therefore not thought necessary to reprint it in full.

(ii.) "*Privileges, etc.*"—The law which defines the "privileges, immunities, and powers" of the British parliament, and of the members thereof, is almost altogether part of the ancient law of England. The branch of English

(*m*) See 34 & 35 Vic. c. 83 (Imp.).

(*n*) See Can. Comm. Jour., 1873 (Oct. Sess.), p. 5; Sess. Pap. (1877), No. 89.

common law which deals with this subject is known as the *lex et consuetudo parliamenti*, and the Judicial Committee of the Privy Council, on appeals from the colonies, have uniformly held that this branch of English common law was strictly local in its application, and referred, not to a supreme legislature in the abstract, but to the Parliament of Great Britain in the concrete, and that therefore it was a branch of the common law which (emigrating colonists) would not carry with them. The grant, therefore, of a legislature to a colony did not, without more, invest such body and its members with those privileges, immunities, and powers which were by the *lex et consuetudo parliamenti* annexed to the British parliament and its members. The powers, other than legislative, of a colonial legislature (unless expressly extended by the terms of the charter, commission, or Imperial Act constituting such legislature), are such only as are incident to or inherent in such an assembly, viz., "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute."—*Kielley v. Carson*, 4 Moo. P. C. 88.

"Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For this purpose, protective and self-defensive powers only are necessary, and not punitive. If the question is to be elucidated by analogy, that analogy is rather to be derived from other assemblies not legislative, whose incidental powers of self-protection are implied by the common law (although of inferior importance and dignity to bodies constituted for purposes of public legislation), than from the British parliament, which has its own peculiar law and custom, or from courts of record, which have also their special authorities and privileges recognized by law."—*Barton v. Taylor*, 11 App. Cas. at p. 203.

The existence of these limitations upon the powers, privileges, and immunities of a colonial legislature was the reason, presumably, for the enactment of the above section



of the B. N. A. Act; and that enactment, and the subsequent enactments of the Dominion parliament, have had the effect—so far as the Dominion parliament is concerned—of relegating the numerous authorities which deal with the position, in this regard, of colonial legislatures to the realm of the constitutional historian. But because of the contention advanced in certain quarters that the provincial legislatures are subject to the law as laid down in those authorities, we may say that in *Barton v. Taylor*, 11 App. Cas. 197, the result of the authorities is clearly stated, and in *Woodworth v. Landers*, 2 S. C. R. 158 (*o*), will be found a compendium of the law on this subject (*p*).

This clause of the B. N. A. Act has, on the other hand, had the effect of limiting the wide power of the Dominion parliament to define by its own legislation the privileges, etc., of itself and its members, conferred by section 5 of the Colonial Laws Validity Act, 1865, as to which see note (i) to section 35, and note (iii) to section 69, *post*. It can never go further than the Imperial parliament in this direction. See further, on this aspect of the case, the notes to section 69, *post*.

As to the nature and extent of these privileges, etc., reference may be made to May, Hatsell, and Bourinot.

(iii) "*Powers*."—The reference is, of course, to powers other than legislative, as for example, the power to commit for contempt, to compel the attendance of witnesses, and to compel the production of papers, etc., etc., which may be described as inquisitorial and punitive powers, in aid of intelligent legislation. As to the trial of election petitions, see notes to section 41, *post*.

(iv) "*Defined by Act of the parliament of Canada*."—Dominion legislation upon this subject is contained in R. S. C. (1886), c. 11, ss. 3-8, 20-23:

(*o*) The "apology" branch of this case is, in view of *Barton v. Taylor*, of doubtful authority.

(*p*) See *Anderson v. Dunn*, 6 Wheat. 504, and *Kilbourn v. Thompson*, 103 U.S. 168, as to the position of Congress.

“PRIVILEGES AND IMMUNITIES OF MEMBERS AND  
OFFICERS.

**3.** The Senate and the House of Commons respectively, and the members thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers as, at the time of the passing of “*The British North America Act, 1867*,” were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to the said Act, and also such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively.

**4.** Such privileges, immunities and powers shall be part of the general and public law of Canada, and it shall not be necessary to plead the same, but the same shall, in all courts in Canada and by and before all judges, be taken notice of judicially.

**5.** Upon any inquiry touching the privileges, immunities and powers of the Senate and of the House of Commons or of any member thereof respectively, any copy of the journals of the Senate or House of Commons, printed or purporting to be printed by the order of the Senate or House of Commons, shall be admitted as evidence of such journals by all courts, justices and others, without any proof being given that such copies were so printed.

**6.** Any person who is a defendant in any civil or criminal proceedings commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of the Senate or House of Commons, may bring before the court in which such proceedings are so commenced or prosecuted or before any judge of the same, first giving twenty-four hours’ notice of his intention so to do to the prosecutor or plaintiff in such proceedings or to his attorney or solicitor, a certificate under the hand of the Speaker or Clerk of the Senate or House of Commons, as the case may be, stating

that the report, paper, votes or proceedings, as the case may be, in respect whereof such civil or criminal proceedings have been commenced or prosecuted, was or were published by such person or by his servant, by order or under the authority of the Senate or House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceedings, and the same and every writ or process issued therein shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue of this Act.

**7.** If any civil or criminal proceedings are commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant at any stage of the proceedings may lay before the court or judge, such report, paper, votes or proceedings, and such copy with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such civil or criminal proceedings, and the same and every writ and process issued therein, shall be and shall be deemed to be finally put an end to, determined and superseded by virtue of this Act.

**8.** In any civil or criminal proceeding commenced or prosecuted for printing any extract from or abstract of any such report, paper, votes or proceedings, such report, paper, votes or proceedings, may be given in evidence, and it may be shown that such extract or abstract was published *bona fide* and without malice, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant.

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#### EXAMINATION OF WITNESSES.

**20.** Witnesses may be examined upon oath or upon affirmation, if affirmation is allowed by law, at the bar of the Senate, and for that purpose the Clerk of the Senate may administer such oath or affirmation to any such witness.

**21.** Any select committee of the Senate or House of Commons to which any private Bill has been referred, by either House, respectively, may examine witnesses upon oath or affirmation, if affirmation is allowed by law, upon matters relating

to such Bill, and for that purpose the chairman or any member of such committee may administer such oath or affirmation, to any such witness.

**22.** Whenever any witness or witnesses is or are to be examined by any other committee of the Senate or House of Commons, and the Senate or House of Commons has resolved that it is desirable that such witness or witnesses shall be examined upon oath, such witness or witnesses shall be examined upon oath or affirmation, if affirmation is allowed by law ; and such oath or affirmation shall be administered by the chairman or any member of any such committee as aforesaid.

**23.** Every such oath or affirmation shall be in the forms A and B respectively, in the schedule to this Act.

(v) "*Commons House.*"—The House of Lords in England has certain judicial and other functions which our Senate does not possess. See notes to section 21, *post*.

**19.** The Parliament of Canada shall be called together not later than six months after the Union.

First Session  
of the Parlia-  
ment of Ca-  
nada.

**20.** There shall be a Session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one Session and its first sitting in the next Session (i).

Yearly Session  
of the Parlia-  
ment of  
Canada.

(i) See chapter VIII. *ante*, p. 168, for some observations as to the duty of a governor to insist upon the observance of this section. In the case of the Dominion government no question has ever arisen, the provisions of the section having been uniformly observed. The object of the section, it is almost unnecessary to observe, is to preserve the English rule of annual grants for the public service. In England, the rule is guarded by the passing of the Mutiny Act for one year only.



## THE SENATE (i).

Number of  
Senators.

**21.** The Senate shall, subject to the provisions of this Act (ii), consist of seventy-two members, who shall be styled Senators.

(i) "*The Senate.*"—Strange as it may appear, a perusal of the debates on the Confederation Resolutions discloses that no question was raised as to the usefulness or uselessness of an Upper House. The bi-cameral system would seem to have been at that time universally favored, so far at least as the constitution of the Dominion government was concerned. To the delegates to the Quebec Conference of 1864, two examples of an Upper House presented themselves—the English House of Lords, and the United States Senate. The position of the former in the English constitutional system is very clearly defined by Bagehot:

"Since the Reform Act, the House of Lords has become a revising and suspending House. . . . Their veto is a sort of hypothetical veto. They say, we reject your bill this once, or these twice, or even these thrice, but if you keep on sending it up, at last we won't reject it."

The House of Lords, too, is possessed of judicial functions of a certain sort, but it is manifest that, both historically and in actual practice, the House of Lords is in no sense a federal element in the Imperial scheme of government, that in no way does it stand out as the guardian of colonial rights. The U. S. Senate on the other hand was instituted as a part of the federal scheme, for the very purpose of protecting "state rights," and to that end, each state, large or small, is entitled to two senators and no more. By the Fathers of our Confederation, the Senate of Canada was announced as answering both purposes; as affording a check on hasty or ill-digested legislation, and also as protecting local interests and the autonomy of the provinces. The attainment of the former purpose was supposed to be

made secure by the mode of appointment, the life tenure of the senators being held out as a guarantee for independence in the exercise of their legislative duties; while the *equal* representation, in the Senate, of each of the distinctly differentiated portions of the Dominion would make that body the guardian of "provincial rights," or at least of local, as distinct from general, interests.

"In order to protect local interests, and to prevent sectional jealousies, it was found requisite that the three great divisions into which British North America is separated, should be represented in the Upper House on the principle of equality. There are three great sections, having different interests, in this proposed Confederation. We have Western Canada, an agricultural country far away from the sea, and having the largest population who have agricultural interests principally to guard. We have Lower Canada with other and separate interests, and especially with institutions and laws which she jealously guards against absorption by any larger, more numerous, or stronger power. And we have the Maritime Provinces, having also different sectional interests of their own; having, from their position, classes and interests which we do not know in Western Canada. Accordingly in the Upper House—the controlling and regulating, but not the initiating branch (for we know that here, as in England, to the Lower House will practically belong the initiation of matters of great public interest) in the House which has the sober second-thought in legislation—it is provided that each of those great sections shall be represented equally by twenty-four members. . . . The provision that each of the great sections shall appoint twenty-four members and no more, will prevent the Upper House from being swamped from time to time by the ministry of the day, for the purpose of carrying out their own schemes or pleasing their partizans. The fact of the government being prevented from exceeding a limited number, will preserve the independence of the Upper House, and make it, in reality, a separate and distinct chamber, having a legitimate and controlling interest in the legislation of the country. . . . There is this additional advantage to be expected from the limitation. To the Upper House is to be confided the protection of sectional interests; therefore it is that the three great divisions

are there equally represented for the purpose of defending such interests against the combination of majorities in the Assembly. It will, therefore, become the interest of each section to be represented by its very best men, and the members of the administration who belong to each section will see that such men are chosen, in case of a vacancy in their section. For the same reason, each State of the American Union sends its two best men to represent its interests in the Senate.”—*Per* Sir John A. Macdonald, in Confed. Deb. p. 35, *et seq.*

The Senate of Canada exercises no judicial functions akin to those exercised by the House of Lords and, to a smaller extent, by the U.S. Senate; nor has it any executive functions like those exercised by the U.S. Senate in “executive session,” in relation to treaties and appointments to office. Its functions are purely legislative.

In the light of subsequent developments, the criticism of Mr. Dunkin, upon this part of the scheme of Confederation, reads like a prophecy. Wanting in the characteristics which, to some extent, uphold the exercise of authority by the House of Lords as a “dignified” part of the constitution (q), the revising and suspending functions of our Senate are a myth and, in practice, are limited to rejecting bills which the government desire to see defeated but do not like to oppose in the popular chamber; and, wanting as its members are in any distinctly different character, aims, and interests from those of the members of the popular chamber, and appointed, too, as they are, not by the provincial legislatures, but by the Dominion government, they are as strongly and continuously party men as are the members of the House of Commons, and they divide on party, not on provincial or sectional, lines. Such federal element as exists at all in the constitution of the Dominion government, is in the distribution of portfolios in the cabinet, as Mr. Dunkin predicted it would be. With the entry of Manitoba, British Columbia and the North West Territories into

(q) See Bagehot, p. 89, *et seq.*



the Dominion, all attempt to continue the principle of *equal* representation was abandoned in favor, practically, of representation by population, so far at all events as the new territories were concerned. Upon the passage of an Act forming a new province, such Act at once passes beyond the competence of the Dominion parliament, and the representation allowed such new province in the Senate is thereafter incapable of increase or decrease except by Imperial legislation (*r*). The representation of the province of Manitoba in the Senate is now three, with a maximum limit of four. Upon the admission of Prince Edward Island, the provisions of section 147, *post*, took effect; and that province is now represented by four Senators. Upon the admission of British Columbia, the representation of that province in the Senate was fixed at three. By the B. N. A. Act, 1886, the Dominion parliament is empowered to make provision for the representation, in the Senate, of any territories which for the time being form part of the Dominion and are not included in any province thereof; and, pursuant to the power granted by that statute, the North West Territories have been given two Senators. There is this peculiarity about the position of the North West Territories—that the number of Senators, who may be appointed to represent that district, is a matter entirely for the Dominion parliament, so that it is in the power of the Dominion government to swamp the Senate, so long as the additional members are appointed to represent the North West Territories. The original design has, however, left this mark upon our system, namely, that Ontario, Quebec, and the Maritime Provinces are still tied down to equality of representation in the Senate, irrespective of differences in population, and any alteration of our constitution in this particular must be by Imperial Act. But it only requires an enumeration of the number of Senators to which each province is entitled, to show that the position of the Senate as a guardian of local interests has entirely vanished.

(*r*) B. N. A. Act, 1871, sec. 6; see *post*, Part IV.



(ii) "*Subject to the provisions of this Act.*"—See sections 26 and 27, *post*, and notes thereto. This Act must now be construed as one with the B. N. A. Acts, 1871 and 1886. See section 3 of the latter statute. We have referred in the last note to the provisions of these statutes, both of which will be found printed in full and further discussed in Part IV. of this work. ✓

Representa-  
tion of Pro-  
vinces in  
Senate.

**22.** In relation to the constitution of the Senate, Canada shall be deemed to consist of three divisions (i)—

1. Ontario ;

2. Quebec ;

3. The Maritime Provinces, Nova Scotia and New Brunswick ; which three divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows : Ontario by twenty-four Senators ; Quebec by twenty-four Senators ; and the Maritime Provinces by twenty-four Senators, twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.

In the case of Quebec (ii) each of the twenty-four Senators representing that Province shall be appointed for one of the twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to chapter one of the Consolidated Statutes of Canada.

(i) "*Three divisions.*"—See note (i) to section 21 *ante*, p. 269 *et seq.*

(ii) "*In the case of Quebec.*"—This sub-section reveals a federal scheme within a federal scheme. See also section

23 sub-section 6. The reason for these provisions is disclosed in the Confederation Debates :

“It has been so arranged to suit the peculiar position of this section of the province (s). Our Lower Canada friends felt that they had French Canadian interests and British interests to be protected and they conceived that the existing system of electoral divisions would give protection to these separate interests. We in Upper Canada, on the other hand, were quite content that they should settle that among themselves, and maintain their existing divisions if they chose.”—*per* Hon. George Brown, Confed. Deb. 90.

“Lower Canada is in a different position from Upper Canada and . . . there are two nationalities in it, occupying certain portions of the country. Well, these divisions have been made so as to secure to both nationalities their respective rights, and these, in our opinion, are good reasons for the provision that has been made.”—*per* Sir E. P. Tache, *ib.* 210.

**23.** The qualification of a Senator Qualifications of Senator. shall be as follows :—

- (1) He shall be of the full age of thirty years :
- (2) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick,

(s) *i.e.*, of (old) Canada.

before the Union, or of the Parliament of Canada after the Union.

- (3) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-aleu or in rotture, within the Province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same :
- (4) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities :
- (5) He shall be resident in the Province for which he is appointed :
- (6) In the case of Quebec he shall have his real property qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

Summons of  
Senator.

**24.** The Governor-General (i) shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of

this Act, every person so summoned shall become and be a member of the Senate and a Senator.

(i) "*The Governor-General.*"—The duties of the Governor-General under this section have been already discussed. See chapter VIII. *ante*, p. 169, where will also be found noted, the different meaning given to the word "summon" in this section, and in section 38.

**25.** Such persons shall be first summoned (i) to the Senate as the Queen by warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

Summons of first body of Senators.

(i) "*Such persons shall be first summoned.*"—See the Queen's Proclamation of Union in the Canada Gazette.

**26.** If at any time on the recommendation of the Governor-General the Queen thinks fit to direct that three or six members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be), representing equally the three divisions of Canada, add to the Senate accordingly.

Addition of Senators in certain cases. (i)

(i) "*Addition of Senators.*"—The Quebec Resolutions made no provisions for any alteration in the number of Senators, and the absence of such provision was commented on in a despatch of the then Secretary of State for the Colonies in these terms:

"The second point which Her Majesty's government desire should be reconsidered, is the constitution of the Legislative Council. They appreciate the considerations which have influenced the Conference in determining the mode in which



this body, so important to the constitution of the legislature, should be composed. But it appears to them to require further consideration, whether, if the members be appointed for life, *and their number be fixed*, there will be any sufficient means of restoring harmony between the Legislative Council and the popular assembly, if it shall ever unfortunately happen that a decided difference of opinion shall arise between them."

The above section was inserted in the Act to meet the views of the Imperial authorities as expressed in the above despatch, but it has never been acted upon. In the only case in which an addition to the membership of the Senate was sought under this section, it was refused by the Imperial authorities (t). In view of the position to which we have before adverted, namely, the power of the Dominion parliament to regulate the number of Senators from those parts of Canada not erected into provinces, this and the next section may be said to be practically effete. It is certainly somewhat anomalous to place in the hands of the Imperial Cabinet the power to grant or refuse the request of the Dominion government, in a matter so entirely one for local consideration.

Reduction of  
Senate to  
normal num-  
ber.

**27.** In case of such addition being at any time made the Governor-General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four Senators and no more.

Maximum  
number of  
Senators.

**28.** The number of Senators shall not at any time exceed seventy-eight (i).

(i) "*Seventy-eight*."—This is the legal limit at present, so far as regards Ontario, Quebec and the Maritime Provinces;

namely, seventy-two under section 21, with a possible addition of six under section 26. In note (i) to section 21, we have referred to the additions which have been made to the membership of the Senate on the admission of the different provinces and territories which, since Confederation, have become part of the Dominion. See also Part IV. There is now no "maximum number" as indicated in the side-note.

**29.** A Senator shall, subject to the Tenure of place in Senate. provisions of this Act (i), hold his place in the Senate for life (ii).

(i) "*Subject to the provisions of this Act.*"—See the two following sections, 30 and 31.

(ii) "*For life.*"—See note (i) to section 21, *ante*, p. 268.

**30.** A Senator may by writing under Resignation of place in Senate. his hand addressed to the Governor-General resign his place in the Senate, and thereupon the same shall be vacant.

**31.** The place of a Senator shall be- Disqualification of Senators. come vacant in any of the following cases:—

- (1) If for two consecutive Sessions of the Parliament he fails to give his attendance in the Senate :
- (2) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience or adherence to a foreign power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a foreign power :

- (3) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter :
- (4) If he is attainted of treason or convicted of felony or of any infamous crime :
- (5) If he ceases to be qualified in respect of property or of residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the Government of Canada while holding an office under that Government requiring his presence there.

Summons on  
vacancy in  
Senate.

**32.** When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor-General shall, by summons (i) to a fit and qualified person fill the vacancy.

(i) "~~By~~ summons."—See note (i) to section 24, and also chapter VIII. *ante*, p. 170.

Questions as  
to qualifica-  
tions and  
vacancies in  
Senate.

**33.** If any question arises respecting the qualification of a Senator or a vacancy in the Senate the same shall be heard and determined by the Senate (i).

(i) "*Determined by the Senate.*"—Up to the date of Confederation, the legislatures of the various provinces had

retained in their own hands the jurisdiction to determine all questions relating to the *status* of their members, and for some years after Confederation, the parliament of the Dominion exercised like jurisdiction. Section 41, however, of the B.N.A. Act (see *post*) impliedly empowers the Dominion parliament to provide otherwise as to the House of Commons, and as the notes to that section will show, this power has been acted upon. No similar power is given by the B. N. A. Act to alter the provisions of this section 33, as to determining the *status* of members of the Senate. As they are not elected by popular vote, question can hardly arise as to the mode of appointment, unless indeed appointments were made in excess of those allowed by the Act. As the various matters which work disqualification, are, with the exception of the failure to give attendance in the Senate (see section 31, sub-section 1), matters as to which questions of disputed fact might arise, it may be worth consideration whether the determination of these matters should not be left to the courts. Up to the present time however, none of the sub-sections of section 31 have been invoked, with the exception of sub-section 1, and upon that head, the proof of disqualification would appear in the Senate's journals.

**34.** The Governor-General may from Appointment of Speaker of Senate. time to time, by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate (i), and may ~~remove~~ remove him and appoint another in his stead.

(i) See R. S. C. (1886), chapter 11, section 24 (a), which provides for a salary of \$4,000 per annum for the Speaker of the Senate. See note to section 44, *post*.

**35.** Until the Parliament of Canada Quorum of Senate. otherwise provides (i), the presence of



at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

(i) "*Until the parliament of Canada otherwise provides.*"—See *Valin v. Langlois* (5 App. Cas. 115), in which it was held that under these same words, in section 41, the Dominion parliament has full power to pass laws in relation to the various matters enumerated in that section. It follows, therefore, that (apart altogether from the provisions of the Colonial Laws Validity Act, 1865, about to be noted) the "quorum" of the Senate may be altered by the Dominion parliament. Compare section 48, *post*, as to the "quorum" of the House of Commons. This latter cannot—so far as the B. N. A. Act affects the question—be altered by anything short of Imperial legislation. But, in reference to the constitution of all colonial legislative bodies, the provisions of the Colonial Laws Validity Act, 1865, must not be overlooked. By the fifth section of that Imperial Statute, it is enacted:

"5.— . . . . Every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting *the constitution, powers and procedure of such legislature*; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of parliament, letters patent, Order in Council or colonial law, for the time being in force in the colony."

It may perhaps be contended that this section cannot apply to Canada, as the B. N. A. Act, 1867, is of a later date; and, certainly, so far as the latter statute contains express provision in reference to the matters referred to in the section quoted, its provisions would govern.

No colonial legislature, it is submitted, can under this section enlarge the sphere of its legislative jurisdiction, and, *a fortiori*, no such authority is conveyed by this section to

any legislative body in Canada, where the field for the exercise of colonial legislative power is divided in such express terms by the B. N. A. Act. The section relates to the organization of the legislative bodies throughout the colonies, their powers *other than legislative*, and the mode in which their functions are to be performed, and has no relation to their sphere of authority. It is submitted, therefore, that the Dominion parliament has full power to alter these various provisions of the B. N. A. Act, relating to *powers and procedure*, except where express or implied limitation upon such power (as, for instance, by section 18, *ante*) is imposed by the Act.

So far as the provincial legislatures are concerned, express power to amend the provincial "constitutions" (except as regards the office of Lieutenant-Governor) is conferred by section 92 (sub-section 1), of the B. N. A. Act, and the maxim *Expressio unius exclusio est alterius* may perhaps be invoked in denial of the power of the Dominion parliament along this line. The argument cannot apply to the question of parliamentary "procedure," but it does very strongly negative any power in the Dominion parliament to alter its "constitution," that being a matter fixed by the agreement of the federating provinces and exhaustively dealt with by the B. N. A. Act. The difficulty is, perhaps, to define what provisions of the B. N. A. Act relate to the "constitution" and what to the "procedure" of the Dominion parliament. See further upon this question, sections 69 and 92 (sub-section 1), *post*, and notes thereto.

**36.** Questions arising in the Senate Voting in Senate. (i) shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

(i) "*Voting in the Senate.*"—Compare sections 49, 79, and 87, and see note to last section.

*The House of Commons.*

Constitution  
of House of  
Commons in  
Canada.

**37.** The House of Commons shall, subject to the provisions of this Act (i), consist of one hundred and eighty-one (ii) members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.

(i) "*Subject to the provisions of this Act.*"—See section 51, *post*, providing for a re-distribution of the representation, as between the various provinces, after each decennial census. See also section 52, which provides that the number of members of the House of Commons may be, from time to time, increased, provided the proportionate representation is not thereby affected. Upon the admission of Prince Edward Island and British Columbia, and upon the formation of the Province of Manitoba, the representation in the House of Commons from those provinces was determined, but subject in each case to re-distribution under section 51. See Part IV., *post*. The North West Territories would seem to be in a peculiar position with regard to their representation in the House of Commons as well as in the Senate. As to the <sup>former</sup> ~~former~~, see note (i) to section 21, *ante* p. 271. As to the <sup>latter</sup> ~~latter~~, see the B. N. A. Act, 1886, which apparently does not limit the power of the Dominion parliament by any reference to section 51 unless, indeed, the provision (section 3) that the B. N. A. Acts of 1867, 1871, and 1886, are to be construed together, would have the effect of making applicable to the representation of the territories, the provisions of section 51. This can hardly be, however, as section 51 is distinctly limited to the distribution of representation as between the "provinces."

(ii) "*181 members.*"—There has just been passed by the Dominion parliament a re-distribution bill, consequent upon

the census of 1891, which apports the membership as follows: (55-56 Vic. c. 11).

Ontario . . . . .	92
Quebec . . . . .	65
New Brunswick . . . . .	14
Nova Scotia . . . . .	20
Prince Edward Island . . . . .	5
Manitoba . . . . .	7
British Columbia . . . . .	6
Total—	209

To which add the representation to  
which the N. W. Territories are  
entitled under R. S. C. c. 7. . . . . 4

Grand total— 213

**38.** The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons (i).

Summoning  
of House of  
Commons.

(i) See chapter VIII., *ante*, p. 168, as to the exercise by the Governor-General of the prerogatives of the Crown, in connection with the summoning, proroguing and dissolving of parliament, where will also be found noted the difference in the meaning of the word "summon" as applied to the members of the House and of the Senate respectively.

**39.** A Senator shall not be capable of being elected or of sitting or voting as a member of the House of Commons.

Senators not  
to sit in House  
of Commons.

**40.** Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick, shall, for the purposes of the election of mem-

Electoral dis-  
tricts of the  
four Provinces

1893  
92  
65  
14  
20  
5  
7  
6  
4-N.W.T.  
215



bers to serve in the House of Commons, be divided into Electoral Districts as follows:—*[Here follows an enumeration (with reference to schedules) of the electoral districts in the provinces named. In view of what appears in note (i) to section 41, it appears needless to reprint this enumeration.]*

Continuance  
of existing  
election laws  
until Parlia-  
ment of Cana-  
da otherwise  
provides.

**41.** Until the Parliament of Canada otherwise provides (i), all laws in force in the several Provinces at the Union relative to the following matters or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections (ii) of such members, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections (iii), and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats vacated otherwise than by dissolution,—shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any elec-

tion for a Member of the House of Commons for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

(i) "*Until the parliament of Canada otherwise provides.*"—The parliament of Canada has long since otherwise provided, and these four sections (40-43) are now therefore practically effete, (except in so far as they confer power to legislate upon the various matters referred to in them. See note (iii) to this section. The electoral districts in the various provinces and territories of the Dominion will be found defined in the Act (55-56 Vic. c. 11) which has just passed the Dominion parliament. The law upon the various matters referred to in section 41 will be found in: R. S. C. (1886), c. 5.—"The Electoral Franchise Act."

" c. 8.—"The Dominion Elections Act."

" c. 9.—"The Dominion Controverted Elections Act."

" c. 10.—Providing for commissions of enquiry in certain cases.

" c. 11.—See sections 9 to 19, *sub. tit.* "independence of parliament";

and the various amendments to these Acts.

In *Willett v. De Grosbois* (*u*), certain pre-Confederation laws of the old province of Canada in respect to election matters were held to be still in force in Quebec. The Act, 23 Vic. c. 17 (1860), made void any contract referring to or arising out of a parliamentary election, even for payment of lawful expenses. The Dominion parliament, after Confederation, passed an Act respecting Dominion elections, but not containing this or any like provision, and it was

(u) 2 Cart. 332; 17 L. C. Jur. 293.

held that this provision, never having been repealed, was in force in Quebec as respects Dominion elections, under this section 41, and section 129, *post*, and that therefore a promissory note given as a contribution to the expenses of a subsequent Dominion election, was void. In 1874, however, this old statute was repealed so far as it affected Dominion elections (37 Vic. c. 9, s. 133), and it was expressly enacted that thereafter pre-Confederation provincial laws touching elections should not apply to elections to the House of Commons.

(ii) "*The voters at elections.*"—The law upon this subject, so far as relates to elections to the House of Commons of the Dominion parliament, will be found in "The Electoral Franchise Act" (R. S. C. c. 5). Compare with this section 41, the provisions of section 84, *post*, relating to elections to the legislative assemblies of the provinces. In reference to provincial "voters' lists" the municipal machinery is utilized, but "the unity in federal and provincial electoral matters has been completely dis severed" (*v*), and for the Dominion an entirely distinct and independent system has been adopted. The work of preparing the lists is committed to revising officers, sitting in "federal courts." In connection with these courts arose (*w*) the question of the jurisdiction of provincial "superior" courts to supervise the exercise of judicial functions by federal courts; this question will be found discussed in chapter XI, *ante*, p. 240, and in the notes to section 101, *post*. We may here note, however, that the decision in *Re Simmons and Dalton* was put upon the ground that the right to vote at an election, Dominion or Provincial, is a "civil right" within the meaning of section 92, sub-section 13, and that therefore a provincial superior court may, by prohibition, restrain a revising officer from improperly interfering with such "civil right." The point is referred to in *Théberge v. Landry*, referred to in the next note. In *Re North Perth* it is thus dealt with:

(*v*) *Per Meredith, J.*, in *Re North Perth*, 21 O.R. at p. 546.

(*w*) *Re Simmons and Dalton*, 12 O.R. 505; *Re North Perth*, 21 O.R. 538.

“Now, the group of statutes relating to the election of members to the House of Commons . . . are all of the proper competence of the Dominion. In particular, Ontario has no legislative power over the electoral franchise of the Dominion. That subject has been regulated by the Parliament of Canada, and a new jurisdiction conferred for the ascertainment of duly qualified voters in and for the Dominion.

“This legislation does not trench upon ‘property and civil rights in the province,’ as was intimated in *Re Simmons and Dalton*, 12 O. R. 505. On the contrary, this class of legislation is contemplated and sanctioned by the 41st section of the B. N. A. Act. R

“Ontario has her own like sphere of the electoral legislation provided for in section 84 of the same Act. Neither interferes with the other, because they occupy different planes of political territory, but both are essential for the efficient working of the Canadian system of dual government.

“The subjects of this class of legislation are of a *political* character, dealing with the citizen as related to the Commonwealth (whether province or dominion), and they are kept distinct in the Federal Constitutional Act from matters of *civil* rights in the provinces, which regard mainly the *meum* and *tuum* as between citizens. It is, in my view, rather confusing to speak of the right of voting as comprehended under the ‘civil rights,’ mentioned in section 92, sub-section 13 of the B. N. A. Act. This franchise is not an ordinary civil right; it is historically and truly a statutory privilege of a political nature, being the chief means whereby the people, organized for political purposes, have their share in the functions of government. The question in hand, therefore, falls within the category not of ‘civil rights in the province,’ but of electoral rights in Canada.”—*Per Boyd, C.*

We may also refer to *Valin v. Langlois* (5 App. Cas. 115), in which it was intimated that, apart even from this section 41, “the administration of justice in the province” could not properly be construed as covering the trial of controverted election cases, arising out of elections to the House of Commons of Canada. See also the next note.



It is, we may say, entirely beyond the scope of this work to discuss the general law and practice in reference to elections and election trials. We simply desire to assign these subjects their proper place in our constitutional system.

(iii) "*The trial of controverted elections and proceedings incident thereto.*"—Prior to confederation, the legislatures of the various provinces followed the example of the British parliament, and retained in their own hands the right to decide all questions as to the *status* of their members, and for some years after Confederation, both the Dominion and provincial legislatures retained this jurisdiction.

"As the House of Commons in England exercised sole jurisdiction over all matters connected with controverted elections except so far as they may have restrained themselves by statutory restrictions, the several Houses of Assembly always claimed and exercised in like manner the exclusive right to deal with, and be the sole judges of election matters, unless restrained in like manner, and this claim, and the exercise of it, I have never heard disputed; on the contrary it is expressly recognized as existing in the Legislative Assembly by the Judicial Committee of the Privy Council in *Théberge v. Landry*," *per* Ritchie, C.J., in *Valin v. Langlois* (3 S. C. R. at p. 10).

See also his short historical sketch of English practice and legislation on this subject, (pp. 12 and 13). In the judgment of the Judicial Committee of the Privy Council (*x*), to which the learned Chief Justice refers, Lord Cairns (p. 106), speaks of the Quebec Controverted Elections Acts of 1872 and 1875, as "peculiar in their character":

"They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in the particular court of the colony for the purpose of taking out, with its own consent, of the legislative Assembly, and vesting in that Court, that very peculiar jurisdiction, which, up to that time, had existed in the Legislative Assembly, of deciding election petitions, and

(x) *Théberge v. Landry*, 2 App. Cas. 102.

determining the *status* of those who claimed to be members of the Legislative Assembly."

and the Committee held, in that case, that those Acts did not annex to the decisions of the tribunals constituted by them, the ordinary incident of being reviewed by the Crown under its prerogative right to hear appeals from colonial courts.

Were there any question of the right of a colonial legislature to set up and exercise such a claim (see notes to section 18, *ante*, p. 262, and section 69, *post*), the above section 41, and the corresponding section (section 84), as to the legislatures of Ontario and Quebec, would seem sufficient statutory acknowledgment of it, and, as noted by Ritchie, C.J., Théberge v. Landry is a distinct recognition of its existence. The particular point involved in Valin v. Langlois was as to the power of the Dominion parliament to confer upon provincial courts, jurisdiction to try petitions under the Dominion Controverted Elections Act, 1875, and this will be found discussed in chapter XI, *ante*, p. 231, *et seq.* and in the notes to section 92, sub-section 14, *post*. It was held that the statute was *intra vires* (3 S. C. R. 1, and 5 App. Cas. 115), and we need here only note that, in the view of the Judicial Committee of the Privy Council, the opening clause of section 41: "*Until the parliament of Canada otherwise provides*": impliedly conferred upon the Dominion parliament full power to make laws in relation to the matters enumerated in the remainder of the section, although not enumerated in any of the various sub-sections of section 91—and this, irrespective of the construction to be put upon the general words of the opening clause of section 91.

"That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the parliament of Canada should otherwise provide. *It was, therefore, the parliament of Canada which was otherwise to provide.* It did otherwise provide by the Act of 1873, which Act it afterwards altered and then passed the Act now in question.

So far, it would appear to their Lordships very difficult to suggest any ground upon which the competency of the parliament of Canada so to legislate could be called in question.”—*per* Lord Selborne, 5 App. Cas. at p. 119. See also *per* Ritchie, C.J., 3 S. C. R. at p. 11.

The legislative jurisdiction of the Dominion parliament with respect to the election of members of that body has been said by the Court of Appeal for Ontario to be “beyond dispute.” See *Doyle v. Bell*, 11 O. A. R. 326 (affirming 32 U. C. C. P. 632), in which the provisions of the Dominion Controverted Elections Act, for the prevention of corrupt practices at elections, and for their punishment, either criminally or by the forfeiture of money to be sued for and recovered by an informer, were upheld as the exercise of power necessarily “incident to the power to regulate the mode of election of members of parliament.” The contention of the defendant was, that the giving of a right of action to an informer was legislation as to “civil rights in the province,” and therefore *ultra vires*. See notes to section 92, sub-section 13, *post*.

The trial of controverted elections was transferred to the courts, in England in 1868; in Ontario in 1870, (34 Vic. c. 3); in Quebec in 1872 (36 Vic. c. 5); by the Dominion parliament in 1873. See also 35 Vic. c. 10 (Manitoba); Con. Stat. c. 40 (British Columbia); R. O. 1888, c. 5 (N. W. Territories); 32 Vic. c. 32 (New Brunswick); 37 Vic. c. 21 (P. E. Island); and 38 Vic. c. 25 (Nova Scotia).

Writs for first election.

**42.** For the first election of members to serve in the House of Commons the Governor-General shall cause writs to be issued by such person, in such form, and addressed to such Returning Officers as he thinks fit.

The person issuing writs under this section shall have the like powers as are

possessed at the Union by the officers charged with the issuing of writs for the election of members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom writs are directed under this section shall have the like powers as are possessed at the Union by the officers charged with the returning of writs for the election of members to serve in the same respective House of Assembly or Legislative Assembly.

**43.** In case a vacancy in the representation in the House of Commons of any Electoral District happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament in this behalf, the provisions of the last foregoing section of this Act shall extend and apply to the issuing and returning of a writ in respect of such vacant District. As to casual vacancies.

**44.** The House of Commons on its first assembling after a general election shall proceed with all practicable speed to elect one of its members to be Speaker. As to election of Speaker of House of Commons.

**45.** In case of a vacancy happening in the office of Speaker by death, resignation or otherwise, the House of Commons shall with all practicable speed proceed As to filling up vacancy in office of Speaker.



to elect another of its members to be Speaker.

Speaker to  
preside.

**46.** The Speaker (i) shall preside at all meetings of the House of Commons.

(i) "*The Speaker*."—See R. S. C. (1886), c. 11, s. 24, which provides that the salary of the Speaker of the House of Commons shall be \$4,000 per annum. The duties of the Speaker are not defined in the B. N. A. Act, otherwise than by section 46, but his position (the same is true of the position of the Speakers of the various Legislative Assemblies) is practically the same as that of the Speaker of the House of Commons in England. His functions are to a certain extent of a semi-judicial nature, and he is supposed to have thrown aside all party bias upon his elevation to the chair. See Bourinot "*Parl. Proc. and Prac.*" (2nd ed.) p. 202, *et seq.*, where will be found a succinct statement of his position and duties. By way of contrast, see Prof. Wilson's "*Congressional Government*" for a clear statement as to the position of the Speaker of the House of Representatives at Washington. There he is supposed to exercise the powers of his office in furtherance of the aims of his political party, and is practically the leader of that party in the House; the chairmen of the various standing committees of Congress are appointed by him, and by exercising judicious selection in this respect he is able to ensure that his views upon public matters will find practical expression in the work of Congress.

Provision in  
case of ab-  
sence of  
Speaker.

**47.** Until the Parliament of Canada otherwise provides (i), in case of the absence for any reason of the Speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the member

so elected shall during the continuance of such absence of the Speaker have and execute all the powers, privileges, and duties of Speaker.

(i) "*Until the Parliament of Canada otherwise provides.*"—See note (iii) to section 41, *ante*. By 48 & 49 Vic. c. 1, there was created the office of Deputy Speaker, with powers as by that statute defined.

**48.** The presence of at least twenty <sup>Quorum of House of Commons (i).</sup> members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers, and for that purpose the Speaker shall be reckoned as a member.

**49.** Questions arising in the House of <sup>Voting in House of Commons (i).</sup> Commons shall be decided by a majority of voices other than that of the Speaker and when the voices are equal, but not otherwise, the Speaker shall have a vote.

(i) "*Quorum*"—"voting."—Compare sections 35 and 36, and see notes to those sections. See also section 87, and notes thereto, *post*.

**50.** Every House of Commons shall <sup>Duration of House of Commons.</sup> continue for five years (i) from the day of the return of the writs for choosing the House (subject to be sooner dissolved (ii) by the Governor-General), and no longer.

(i) "*Shall continue for five years.*"—This is one of those matters which, it is submitted, the Dominion parliament has no power to alter—see note (i) to section 35, *ante*—while provincial legislatures may lengthen or shorten the period of their own duration. See section 92, sub-section 1.

(ii) "*Dissolved by the Governor-General.*"—See chapter VIII., *ante*, p. 165, for a full discussion of the powers of the Governor-General in connection with the summoning, proroguing, and dissolving of parliament.

Decennial Re-  
adjustment of  
Representa-  
tion.

**51.** On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four Provinces shall be readjusted by such authority (i), in such manner and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

- (1) Quebec shall have the fixed number of sixty-five members.
- (2) There shall be assigned to each of the other Provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).
- (3) In the computation of the number of members for a Province a fractional part not exceeding one-half of the whole number requisite for entitling the Province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number.

- (4) On any such re-adjustment the number of members for a Province shall not be reduced unless the proportion which the number of the population of the Province bore to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the Province is ascertained at the then latest census to be diminished by one-twentieth part or upwards.

- (5) Such re-adjustment shall not take effect until the termination of the then existing Parliament.

(i) "*By such authority.*"—From the debates on the Quebec Resolutions in the parliament of (old) Canada, it would appear that some uncertainty existed as to the terms of the 24th resolution. As printed in the volume of Debates on Confederation (published by authority), resolutions Nos. 23 and 24, read as follows :

"23.—The legislature of each province shall divide such province into the proper number of constituencies and define the boundaries of each of them.

"24.—The local legislature of each province may, from time to time, alter the electoral districts for the purpose of representation *in such local legislature*, and distribute the representation to which the province is entitled in such local legislature, in any manner such legislature may see fit."

In Gray's "Confederation"—Mr. Gray was a delegate to the Conference, from New Brunswick—the 24th resolution is given thus :

"The local legislature of each province may, from time to time, alter the electoral districts for the purposes of representation *in the House of Commons*, and distribute the representation to



which the province is entitled in any manner such legislature may see fit."

In moving the resolutions in the House, the Attorney-General-West (Sir John A. Macdonald) said :

"A good deal of misrepresentation has arisen from the accidental omission of some words from the 24th resolution. It was thought that by it the local legislatures were to have the power of arranging hereafter, and, from time to time, of re-adjusting the different constituencies, and settling the size and boundaries of the various electoral districts. The meaning of the resolution is simply this : that for the *first* General Parliament, the arrangement of constituencies shall be made by the existing local legislatures ; that in Canada, for instance, the present Canadian parliament shall arrange what are to be the constituencies of Upper Canada, and to make such changes as may be necessary in arranging for the 17 additional members given to it by the constitution ; and that it may also, if it sees fit, alter the boundaries of the existing constituencies in Lower Canada. In short, this parliament shall settle what shall be the different constituencies electing members to the first Federal Parliament. And so the other provinces,—the legislatures of each will fix the limits of their several constituencies in the session in which they adopt the new constitution. Afterwards the local legislatures may alter their own electoral limits as they please, for their own local elections. But it would evidently be improper to leave to the local legislatures the power to alter the constituencies sending members to the General Legislature, after the General Legislature shall have been called into existence. . . . No ; after the General Parliament meets, in order that it may have full control of its own legislation, and be assured of its position, it must have the full power of arranging, and re-arranging the electoral limits of its constituencies as it pleases, such being one of the powers essentially necessary to such a legislature." Confed. Deb. p. 39.

Both of these resolutions were struck out at the conference, in London, of the delegates from those provinces which had agreed to the Quebec Resolutions, probably because the limits of the various constituencies had been

settled by the local legislatures in the manner pointed out by Sir John Macdonald, and such arrangement was put into statutory form, in section 41. Nothing appears in these resolutions, or in the debates thereon, in reference to the question of delegating the power of "distribution" to an authority independent of parliament; but, as we write, the question has been raised in the Dominion parliament, and two of the Fathers of Confederation are reported to have stated that the above section 51, was deliberately framed as it is, in order to take from parliament this dangerous power—dangerous in the hands of any majority—and to secure its exercise by an independent authority. If such was the intention, it has been persistently ignored, and the re-distribution after both the census of 1871 and of 1881, was effected by an Act of the Dominion parliament in the exercise of its ordinary legislative functions; and an Act (55-56 Vic. c. 11) has just been passed by the Dominion parliament providing for the re-distribution consequent upon the census of 1892. As a legal proposition, the power of the Dominion parliament to constitute itself the authority by which the re-adjustment is to be effected, cannot be doubted whatever may be said of the impropriety of so doing. Under section 40, *ante*, p. 283, the power of the Dominion parliament to alter electoral districts is clearly established. See note (i) to section 41. This section 51 applies only to the re-adjustment of the representation of the provinces *as between themselves*, and has no reference to the boundaries of the electoral districts in each province, and it would appear therefore that the re-adjustment, under this section, is a matter merely of mathematics. The wording of section 52 bears out this construction, indicating as it does that the "fixed quantity" in the scheme of representation, is the *proportionate* representation of the provinces. The electoral districts may be altered at any time (section 40), and the total number of members increased (section 52), by the parliament of Canada,

“provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed.”

Increase of  
number of  
House of  
Commons.

**52.** The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation (i) of the Provinces prescribed by this Act is not thereby disturbed.

(i) “*The proportionate representation.*”—See note (i) to section 37, *ante*.

#### MONEY VOTES (i), ROYAL ASSENT.

Appropriation and tax bills.

**53.** Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

(i) “*Money votes.*”—The subject of money votes relates more particularly to parliamentary procedure and practice, and the subject will be found fully discussed in Dr. Bourinot’s work upon that subject (2nd ed., chapter XVII). The restriction provided for by section 54 was first introduced into Canada by the Union Act, 3 & 4 Vic. c. 35, s. 57. See Lord Durham’s report, p. 34. The restriction is enforced by the Speaker upon a point of order taken.

Recommendation of money vote.

**54.** It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the Session in which

such vote, resolution, address, or bill is proposed.

**55.** Where a bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

Royal assent  
to bills, &c. (i).

(i) "*Royal assent.*"—The provisions of this and the two following sections have been already fully discussed; see *ante*, chapter VII., p. 147, *et seq.*

**56.** Where the Governor-General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State; and if the Queen in Council within two years after the receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act from and after the day of such signification.

Disallowance  
by order in  
Council of Act  
assented to by  
Governor-  
General.



Signification  
of Queen's  
pleasure, on  
bill reserved.

**57.** A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General signifies, by speech or message, to each of the Houses of the Parliament or by proclamation, that it has received the assent of the Queen in Council.

An entry of every such speech, message, or proclamation shall be made in the Journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of Canada.

## V.—PROVINCIAL CONSTITUTIONS (i).

### *Executive Power (ii).*

Appointment  
of Lieutenant-  
Governors of  
Provinces.

**58.** For each Province there shall be an officer (iii), styled the Lieutenant-Governor (iv), appointed by the Governor-General in Council by instrument under the Great Seal of Canada (v).

(i) "*Provincial constitutions.*"—In chapter III. will be found a discussion of the question how far the pre-Confederation provincial constitutions are continued by the B. N. A. Act. That chapter was written in order to show that the working principle of those earlier constitutions was evidently intended to be continued in the constitutions of the provinces as defined in the B. N. A. Act. Ever since the passage of that Act, there has been in progress a peaceful warfare as to the position of the provinces under our

constitutional system,—a conflict not yet perhaps ended but now become hopeless to those who would deny the full autonomy of the provinces in relation to all those matters which, by the B. N. A. Act, are committed to the legislative authority of the provincial assemblies. In the earlier stages, the attack was directed toward narrowing the range of the legislative power of the provinces, and this phase of the conflict has been already dealt with in chapter X. At the present time the debateable ground is that relating to the exercise of executive power in connection with the government of the provinces, the contention of those who would belittle the executive “sphere of authority” of the provinces being, in effect, that under the B. N. A. Act, there has been a severance of the functions of government in relation to some, at least, of those subject matters which, for purposes of legislative action, have been committed to the provinces. In the earlier pages of this book we have not hesitated to attack this position, and further reference to the question will be found in the following notes. We should mention, however, that the first three chapters of this book were already in press before the report of the judgment of the Judicial Committee in *Liquidators of Maritime Bank v. Receiver General of New Brunswick* (Times L. R. Vol. VIII., p. 677) reached us, and this fact will account for the lack of reference to this important decision as supporting the views expressed in those chapters upon this question of the position of the provinces. The particular point for decision was as to the right of the provincial executive of New Brunswick to claim the benefit of the prerogative right of the Crown to priority over other creditors, in the winding up of the affairs of the Bank, but the judgment of the Committee deals with the general question, and, as we have already intimated, affirms, with final authority, the full autonomy of the provinces.

“The appellants conceded that, until the passage of the B. N. A. Act, 1867, there was precisely the same relation between

the Crown and the province which now subsists between the Crown and the Dominion ; but they maintained that the effect of the statute had been to sever all connection between the Crown and the provinces, to make the government of the Dominion the only government of Her Majesty in North America, and to reduce the provinces to the rank of independent municipal institutions. For these propositions their Lordships have been unable to find either principle or authority. Their Lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867, which nowhere professed to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, intrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers, *executive and legislative*, and all public property and revenues which had previously belonged to the provinces, so that the Dominion government should be vested with such of those powers, property, and revenue as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government."

(ii) "*Executive power.*"—In arriving at a proper understanding of the position of the provincial executive, nothing is more essential than to have a definite idea of the necessary connection which, in any country where the government is a government-according-to-law, must exist between the legislative and executive powers in government : and various phases of this question will be found discussed in chapter I. (*ante*, p. 12, *et seq.*), chapter III. (*ante*, p. 45, *et seq.*), and chapter VI. (*ante*, 142, *et seq.*), and in the notes to section 9, *ante*, and the other notes to this section 58.

(iii) "*There shall be an officer.*"—Compare section 10

*ante*, and see notes thereto. See also chapter III., *ante*, p. 48, and notes to section 59, *post*.

(iv) "*The Lieutenant-Governor*."—The Lieutenant-Governor of a province is the chief executive officer "carrying on the government of the province"—see section 62, *post*. In some of the cases will be found discussed the question whether or not a Lieutenant-Governor is to be considered a representative of the Queen. In *Regina v. Amer* (y), Harrison, C.J., laid it down that the Governor-General is the only officer named in the B. N. A. Act who answers that description—see notes to section 10, *ante*; and in *Regina v. Bank of Nova Scotia*, in our Supreme Court, Mr. Justice Taschereau says (z): "The Lieutenant-Governors, no doubt, in the performance of certain of their duties as such, under the B. N. A. Act, may be said to represent Her Majesty in the same sense, and as fully, perhaps, as Her Majesty is represented, for instance, by justices of the peace, constables, and bailiffs, in the execution of their duties." A reference to chapter VIII., *ante*, and to the cases which define the position of the Governor of a colony, will show that this description of a Lieutenant-Governor is equally applicable to the Governor-General. Both are "officers," with powers, authorities, and functions distinctly limited, and they can be said to represent Her Majesty, not in the sense of being Viceroys, but only to the extent to which powers are delegated to them, by virtue of their commissions, or under the B. N. A. Act. In the very case to which we have last referred—*The Queen v. Bank of Nova Scotia*—Mr. Justice Strong points out that the Queen is at the head of the government of Canada—see section 9 and notes thereto. This section, as was pointed out, is declaratory, and, so considered, it entirely agrees with what is laid down by the older writers as to the necessary unity of executive government throughout the Empire. "The King of England is therefore not only the chief, but properly

(y) 42 U. C. Q. B. 391.

(z) 11 S. C. R. at p. 24.



the sole magistrate of the nation; all others acting by commission from, and in due subordination to him" (a). Anything therefore which may be said in the way of belittling the office of Lieutenant-Governor, is equally applicable to the position of the Governor-General—with this difference, of course, that the territorial sphere of authority of the latter is larger, and the range of matters in connection with which his powers may be exercised quite different from that of a Lieutenant-Governor. But each of these officers is characterized by the B. N. A. Act—see sections 10 and 62—as the chief executive officer "carrying on the government" of the Dominion and the provinces respectively. Any officer, exercising executive functions anywhere in the British Empire, must act under commission from the Queen, and, to the extent indicated by his commission and any Imperial statute in that behalf, does represent, *and act on behalf of and in the name of*, the executive head of the Empire. We pointed out in the notes to section 9, *ante*, that the Governor-General of Canada occupies a dual position, and the same may be said of the Lieutenant-Governor of a province. In a sense, he is a member of the executive staff of the Dominion government, as well as executive head of the province. But there is this difference to be noted between his position, and that of the Governor-General, namely, that while, on the one hand, the Imperial parliament has legally unlimited power over the Dominion in respect of every conceivable subject matter, and may therefore increase or diminish the power of a Governor-General, the parliament of Canada, on the other hand, cannot invade the legislative sphere of a provincial assembly, or interfere in relation to its executive head. This practical result therefore ensues that a Lieutenant-Governor, once appointed, is subject to the "instructions" of the Governor-General only upon, at most, those matters in respect to which the executive of the Dominion

(a) Chitty, p. 4.

is entitled to exercise supervision over provincial legislation. As executive head of a province, the Lieutenant-Governor is commissioned, by the B. N. A. Act, to "carry on the government of the province"; and any attempt to instruct him as to how he should exercise the powers, authorities, and functions of his office in relation to matters within the sphere of provincial authority, would be in direct subversion of the principle of provincial autonomy as now authoritatively declared.

The division of subject matters affected by that Act being exhaustive (*i. e.*, exhaustive of all matters over which colonial legislatures have power) and exclusive as well (*b*), the same principle must be acknowledged in reference to the division of those matters for executive action. Most of the cases which have arisen under the B. N. A. Act have involved enquiry as to the position of the dividing line, for legislative purposes, between Dominion and Provincial jurisdiction; but, as we have always insisted, the ascertainment of such line is at the same time the ascertainment of the line of division for executive action. In more recent times the question has arisen directly in reference to the exercise of executive power, and the courts of Ontario have distinctly recognized the principle for which we have been contending. Reference has been made to the limitation of sections 12 and 65 to *statutory* "powers," etc.; and as to these, the provisions of the B. N. A. Act seem to be perfectly clear. See chapter III., *ante*, p. 50. The dispute has been in reference to what may be called prerogatives proper, *viz.*, those powers connected with executive government which depend for their efficacy upon the common law.

In 1887, the Legislative Assembly of Ontario passed "an Act respecting the executive administration of the laws of this province," making provision as to the exercise of executive authority in connection with these common law prerogatives. The question of the validity of this Act was

(b) See Chapter X.

submitted to the Divisional Court of the Chancery Division, which decided in favor of its validity, and an appeal to the Court of Appeal for Ontario was dismissed. The Act was distinctly limited to executive action in connection with those subject matters over which the provincial legislative assembly has jurisdiction, and (construing the Act as so limited) the courts decided that, although possibly the Act was unnecessary, it could not be said to be *ultra vires*. The position may be summed up in the language of Mr. Justice Burton (c):

"I have always been of opinion that the legislative and executive powers granted to the province were intended to be co-extensive, and that the Lieutenant-Governor became entitled, *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters in which provincial legislatures have jurisdiction; that he had in fact delegated to him the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion. . . . In my view, no legislation was necessary, but, to remove doubts, such an Act seems desirable and free from objection."

Reference should now be added to the passage from the judgment of the Privy Council quoted in note (i), *ante*, p. 302, and to the further passage quoted in the next note. See, also, notes to section 69, *post*, as to the position of the Lieutenant-Governor in relation to the provincial assemblies, where we have endeavored to make clear that the Queen is a constituent branch of such assemblies, being represented therein by the Lieutenant-Governor, just as she is represented in the Dominion parliament by the Governor-General.

(v) "*Appointed by the Governor-General, etc.*"—Much stress has been laid upon this clause in support of the con-

tention that a Lieutenant-Governor is not a representative of the Crown, but of the Governor-General. The following extract from the judgment of the Judicial Committee of the Privy Council in *Liquidators, &c. v. Receiver-General of New Brunswick*, will show how the question has been finally disposed of:

"The appellants . . . . . relied upon the fact that, whereas the Governor-General of Canada is directly appointed by the Queen, the Lieutenant-Governor of a Province is appointed, not by Her Majesty, but by the Governor-General, who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that by section 58 the appointment of a provincial Governor is made by the 'Governor-General in Council, by instrument under the Great Seal of Canada,' or, in other words, (by the executive government of the Dominion which is by section 9 expressly declared 'to continue and be vested in the Queen.' There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body *who have no power and no functions except as representatives of the Crown*. The Act of the Governor-General and his council in making the appointment was, within the statute, the Act of the Crown; and a Lieutenant-Governor, when appointed, was as much (the representative of Her Majesty for all purposes of provincial government, as the Governor-General himself was for all purposes of Dominion government . . . . .") and the decisions in *Mercer v. Attorney-General of Ontario* (8 App. Cas. 767), *St. Catharines Milling Co. v. The Queen* (14 App. Cas. 46), and *Attorney-General of British Columbia v. Attorney-General for Canada* (14 App. Cas. 295), are referred to by the Committee as "based upon the general recognition of Her Majesty's *continued* sovereignty under the Act of 1867."



The view expressed in the italicized portion of the above extract affirms what we had ventured to lay down (*ante*, p. 304), that a Lieutenant-Governor, once appointed, is subject to "instructions" from the Governor-General only upon those matters connected with the exercise, by the executive of the Dominion, of supervision over provincial legislation. See section 90, *post*.

Tenure of  
office of  
Lieutenant-  
Governor.

**59.** A Lieutenant - Governor shall hold office during the pleasure of the Governor-General; but any Lieutenant-Governor appointed after the commencement of the first Session of the Parliament of Canada shall not be removable (i) within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then within one week after the commencement of the next Session of the Parliament.

(i) "*Shall not be removable . . . . except for cause.*"—The position of the Governor-General in reference to the removal of a Lieutenant-Governor has been already referred to—see notes to section 9, *ante*, p. 251. The only instance of such removal which has so far occurred under the B. N. A. Act, is that of Lieutenant-Governor Letellier, and it was in connection with his removal that the Imperial authorities laid down the "conventional" rule that the Governor-General should act, under this section 59, *by and with the advice of the Queen's Privy Council for*

*Canada.* But, as has been already pointed out, the power of removal (subject to the observance of the formalities prescribed by the section) is, legally, with the Governor-General alone. The cause assigned in the Order for the removal of Lieutenant-Governor Letellier was that, after the vote of the two Houses of the Dominion parliament censuring him for the dismissal of his ministers, his usefulness as a Lieutenant-Governor was gone. Had Lieutenant-Governor Letellier declined to recognize the validity of the Order in Council, a very nice question would have been raised as to the meaning of the phrase "for cause assigned," for it is very doubtful if the facts alleged constituted "cause" within the meaning of this section. Is the Dominion government—for, under the terms of the despatch to the Governor-General in this case, it is left with that government—the sole judge of what constitutes "cause"? If so, a Lieutenant-Governor holds his office subject possibly to partisan caprice, not to law. Is the vote of the Houses of the Dominion parliament an element of "cause"? If so, a Lieutenant-Governor is subject to the vote of a parliament which cannot enact a single law to govern his conduct in the administration of the affairs of the province over which he presides. On the other hand, it may be argued that as the Lieutenant-Governor is a link in the chain of federal government (now practically operative throughout the Empire), appointed by the executive of the Dominion, who are responsible to the electorate of Canada *through the Dominion parliament*, the decision of that parliament, expressive of the will of the people of Canada as a whole, should govern in regard to all matters entrusted to the executive of the Dominion. The difficulty is that the executive power, in this regard, of the Dominion government is entirely divorced from all legislative power. That government "has no powers and no functions except as representatives of the Crown" in this matter of the removal of a Lieutenant-Governor (see *ante*, p. 307. It strikes one

that it may perhaps be advisable for the Imperial authorities to reconsider the "instructions" above referred to.

Salaries of  
Lieutenant-  
Governors.

**60.** The salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Oaths, &c.,  
of Lieutenant  
Governor.

**61.** Every Lieutenant - Governor, shall, before assuming the duties of his office, make and subscribe before the Governor-General or some person authorized by him, oaths of allegiance and office similar to those taken by the Governor-General.

Application  
of provisions  
referring to  
Lieutenant-  
Governor.

**62.** The provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each Province or other the chief executive officer or administrator for the time being carrying on the government (i) of the Province, by whatever title he is designated.

(i) "*Carrying on the government of the province.*"—See notes to section 10, *ante*, p. 254, and to section 58, *ante*, p. 303. The word "government," in its widest sense, comprises the exercise of both the law-making and the law-executing power, but here it has more particular reference to the exercise of the executive powers of government, the legislative powers of a Lieutenant-Governor being exercisable only in connection with the legislative assembly. See section 69, *post*.

Appointment  
of executive  
officers for  
Ontario and  
Quebec.

**63.** The Executive Council (i) of Ontario and of Quebec shall be composed of such persons as the Lieutenant-Governor

from time to time thinks fit, and in the first instance of the following officers, namely:—the Attorney-General (ii), the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with, in Québec, the Speaker of the Legislative Council and the Solicitor-General.

(i) “*Executive Council*.”—Compare section 11, and see notes thereto, *ante*, p. 255. Since 1867, the Executive Council of Ontario has been increased by the addition of a Minister of Education and a Minister of Agriculture. See section 92, sub-section 1, and notes thereto.

(ii) “*The Attorney-General*.”—The position of a provincial Attorney-General will be found discussed in *Attorney-General v. Niagara Falls International Bridge Co.*, 20 Grant, 34; *Attorney-General v. International Bridge Co.*, 28 Grant, 65, 6 O. A. R. 537; and in *Mousseau v. Bate*, 27 L. C. Jurist, 153. In the first case, it was held by Mr. Justice Strong, that the Attorney-General of a province is the officer of the Crown who is considered as present in the courts of the province to assert the rights of the Crown, and of those who are under its protection, and that the provincial Attorney-General, and not the Attorney-General for the Dominion, is the proper party to file an information when the complaint is, not of an injury to property vested in the Crown as representing the government of the Dominion, but of a violation of the rights of the public of a province. The information, in that case, was in respect of a nuisance caused by the defendant company's interference with a railway incorporated prior to 1867. In the second case it was held by the Court of Appeal, reversing the judgment of Spragge, C., that the



non-compliance by a company, incorporated by an Act of the Dominion parliament, with the terms of such Act, such non-compliance operating, as was alleged, to the detriment of the locality in which the work was being carried on, could not be the subject matter of an information at the instance of the provincial Attorney-General. In *Mousseau v. Bate*, decided in Quebec (1883), it was held that proceedings in the nature of a *sci. fa.* to set aside letters patent of invention, issued under the Dominion Patent Act, cannot be instituted in the name of the Provincial Attorney-General, but can only be legally taken by the Attorney-General for the Dominion. See further, upon this last subject, the notes to sub-section 22 of section 91, *post*. It has been practically conceded by the Dominion government that a provincial Attorney-General properly represents the Crown in criminal prosecutions before provincial courts, but so far as we are aware there has been no judicial determination of the point. It seems difficult to appreciate the distinction between proceedings in respect of a breach of criminal law, and proceedings founded upon a breach of "patent" law. Dominion statutes, however, expressly recognize the intervention of a provincial Attorney-General in the former class of cases. See *Abraham v. The Queen*, 6 S. C. R. 10.

As to the liability of members of the Executive Council for acts done by them in the performance of their duties as such, see *Molson v. Chapleau* (3 Cart. 360), where their non-liability is distinctly affirmed. This latter subject is, however, while no doubt a question of constitutional law, so fully treated of by other writers, that it is not deemed advisable to enter upon it here. See *Broom's Constitutional Law*, p. 521, *et seq.*; *Forsyth's Opinions on Constitutional Law*, p. 85; and see also the *Muskoka Mill Co. v. The Queen*, 28 Grant, 563; *O'Brien v. The Queen*, 4 S. C. R. 529; *re The Massey Manufacturing Co.*, 13 O. A. R. 446; and *re Bell Telephone Co.*, 9 O. R. 339.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act (ii), continue as it exists at the Union until ~~altered under the authority of this Act~~ (iii).

Executive Government of Nova Scotia and New Brunswick (i).

(i) The early constitutions of the Maritime Provinces will be found treated of in chapter II., *ante*. In chapter III. we have pointed out the importance of this section, taken in connection with section 88, as showing that in the Maritime Provinces at least, the old provincial constitutions are continued; the sphere of their authority being, of course, under the B. N. A. Act, limited to a smaller range of matters. See also notes to section 58, *ante*.

(ii) "*Subject to the provisions of this Act.*"—That is to say, subject to the change in the mode of appointment of the executive head of the province, and subject also to those provisions of the B. N. A. Act, which limit the provincial sphere of authority. These are the only provisions of the Act which in any way limit the full operation of this section, unless perhaps the group of clauses which deal with the division of assets—see section 102, *et seq. post*,—may be said to be provision relating to the provincial constitutions. See particularly the notes to the word "royalties" in section 109.

(iii) "*Until altered under the authority of this Act.*"—That is to say, until altered by the provincial legislative assemblies, under section 92, sub-section 1. See notes thereto.

65. All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great

Powers to be exercised by Lieutenant-Governor of Ontario or Quebec with advice or alone (i).

Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction with the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective Legislatures of Ontario and Quebec (ii).

(i) See notes to section 12. *ante*. p. 256; and see also chapter III., p. 48, *et seq.* The powers here referred to are statutory powers. No such provision is made in reference to Nova Scotia and New Brunswick, nor in the Orders in

Council admitting Prince Edward Island and British Columbia to the Dominion. Owing to the division of (Old) Canada into Ontario and Quebec, it was necessary to provide for the exercise of the powers, etc., which had theretofore been exercised by the Governor or Lieutenant-Governor of the old provinces; and by section 12, *all* such powers are vested in the Governor-General, so far as the same are capable of being exercised in relation to the government of Canada, while, by this section, the very same powers, in their entirety, are vested in the Lieutenant-Governors of Ontario and Quebec respectively. The two sections, taken together, effect no division of power, but provide simply for the exercise of the same powers in the different spheres of authority created by the B. N. A. Act. In *Gibson v. McDonald* (*d*), Mr. Justice O'Connor, referred to a slight difference in the wording of this section, as compared with section 12,—the words “as far as the same continue in existence,” which appear in the 12th section, being omitted from this 65th section—indicating, in his opinion, that some powers continued to exist in relation to the Dominion, and were vested therein, which did not continue to exist in relation to the provinces. It is difficult to imagine what idea in the mind of the draftsman led to this difference in phraseology. The governments of the Dominion and of the provinces of Ontario and Quebec were all, in a sense, new creations. The exercise of these powers, etc., in relation to the government of the Dominion cannot be said to be a *continuation* of them, while, in a sense it may be so spoken of in relation to the governments set up by the B. N. A. Act, in Ontario and Quebec. It is impossible to assign any difference in meaning to the two sections, owing to this difference in phraseology. Their effect is sufficiently clear, that all these powers, etc., are to be vested in the executive head of the Dominion and of each provincial government, so far as they are capable of



being exercised in relation to those governments respectively.

The fact that the B. N. A. Act does effect a clear division of the "sphere of authority," seems not to have been appreciated in *Regina v. Amer (dd)*, where Mr. Justice Wilson treats these two sections as vesting the same power in the Governor-General and a Lieutenant-Governor *in reference to the same subject matter*. In view of the subsequent discussions which have taken place in reference to the scheme of the B. N. A. Act, the words which we have italicized, would seem to be an incorrect construction of these two sections.

In *Attorney-General for Quebec v. Reed* (8 S. C. R. 408, affirmed on appeal, 10 App. Cas. 141), it was contended that the Quebec Act, 43 & 44 Vic. c. 9, which imposed a duty, to be paid in stamps, upon every "exhibit" filed in court in any action depending therein, might be supported under C. S. L. C., c. 109, section 32, which gave to the government of (Old) Canada, power to impose by Order in Council such a duty on exhibits. This contention is thus disposed of in the judgment of the Judicial Committee of the Privy Council :

"With regard to the third argument, which was founded upon the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-existing powers of the Governors or Lieutenant-Governors in Council to do certain things not there specified. That however was subject to a power of abolition or alteration by the respective legislatures of Ontario and Quebec, with the exception of course of what depended on Imperial legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that among those powers, there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the courts, not for the general revenue purpose of the

province, but for the purpose of forming a special fund called "The Building and Jury Fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not in aid of the Building and Jury Fund. It is a legislative Act, without any reference whatever to those powers; if they still exist, quite collateral to them; and, if they still exist, it is capable of being exercised concurrently with them."

See further as to this case, section 92, sub-section 2. The power of the Lieutenant-Governor to impose, by Order in Council, such tax as was in question in *Attorney-General v. Reed*, has been entirely abrogated by the limitation of provincial powers of taxation to direct taxation; a limitation which, it is submitted, applies to all the revenue producing powers of provincial governments. This point is referred to, but not decided in *Attorney-General v. Reed*; see 10 App. Cas. at p. 145. A reference to the judgment of Gwynne, J., in the Supreme Court—see 8 S. C. R., at p. 432—will show that, in his view, this limitation does so apply. See, also, the decisions of the Manitoba Courts referred to in the notes to sub-section 2 of section 92, *post*.

In *Lenoir v. Ritchie* (3 S. C. R. 575) the question of the power of the Nova Scotia Provincial Assembly to authorize the Lieutenant-Governor to appoint Queen's Counsel, and to assign precedence, as between those Queen's Counsel and those appointed by the Dominion Government, was under consideration. Before Confederation, the question was not regulated by any statutory enactment, but the Governors and Lieutenant-Governors of the various provinces had been in the habit of exercising the prerogative of the Crown in this regard. After Confederation, the government of the Dominion claimed that the Governor-General, as representative of Her Majesty in Canada, was alone entitled to exercise this prerogative. It was treated as falling within the class of prerogatives vested in the Crown as the fountain of honour—treated so to speak as a prerogative-at-large, not connected with any particular

department of executive government. If this be its proper position, it is hard to see how any colonial officer can exercise such prerogative. All the other prerogatives which fall within this category are treated as prerogatives pertaining to *matters of Imperial concern*, such as, for instance, the appointment of knights, baronets, etc., etc. If, on the other hand, the prerogative is one connected with the administration of justice, it would appear that it is one proper to be exercised both by the Governor-General and the Lieutenant-Governors of the various provinces—by the former in relation to courts of Dominion creation, by the latter in connection with provincial courts. It is laid down in all the books that members of the Bar are “officers” of the courts, and the assignment of precedence to certain of those members, would seem to be a matter relating either to the organization of the courts or to procedure therein. In *Lenoir v. Ritchie*, it was not necessary to the determination of that case to decide whether or not a Lieutenant-Governor is entitled to exercise this prerogative—the question there involved being as to the precedence given to provincial over Dominion Queen’s Counsel. At the same time, some of the judges, both in the Nova Scotia courts and in the Supreme Court of Canada, expressed very decided views against the right of the Lieutenant-Governor to exercise the prerogative in any case. The question is now standing for argument before the Court of Appeal for Ontario. Subject to the assignment of this prerogative to its proper place in connection with executive government—to defining the subject matter within which it properly falls—the general principle which must govern in regard to all these questions of “prerogative” would now seem to be authoritatively stated in the judgment of the Privy Council in *Liquidators of Maritime Bank v. Receiver-General of New Brunswick*. See notes to section 58, *ante*.

(ii) “*Subject to be abolished or altered by the respective legislatures of Ontario and Quebec.*”—See notes to section 12, *ante*, p. 257; also to section 129, *post*. The decision

in *Dobie v. Temporalities Board*, 7 App. Cas. 136, is directly applicable to the interpretation of these two sections, 12 and 65. All the various subject matters in respect to which, before Confederation, these “powers, authorities, and functions” could be exercised, are, by the effect of these sections, divided, and, in relation to each division, *(all* these powers, etc., are vested in the executive head of the Dominion and of each province respectively. But in respect to each division, the Dominion parliament or the provincial legislative assembly may abolish or alter these powers in such fashion, and to such extent, as may be thought necessary to the proper government of the Dominion or the province, as the case may be. The holding in *Dobie v. Temporalities Board* is thus expressed in the head-note :

“The powers conferred by the B. N. A. Act, 1867, section 129, upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of Canada, are precisely co-extensive with the powers of direct legislation, with which those bodies are invested by the other clauses of the Act of 1867.”

See further as to this section, *Attorney-General (Canada) v. Attorney-General (Ontario)*, 20 O. R. 222; affirmed in appeal, 19 O. A. R. 31.

**66.** The provisions of this Act refer-  
ring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the advice of the Executive Council thereof (i).

Application  
of provisions  
referring to  
Lieutenant-  
Governor in  
Council.

(i) Compare section 13, *ante*, p. 258. A reference to section 65, suggests that there may possibly be powers vested in the Lieutenant-Governor of a province which he may exercise individually; that is to say, that his exercise of such powers, even contrary to the advice of the Execu-



tive Council, would be legally valid. So far as the B. N. A. Act itself is concerned, the only powers which a Lieutenant-Governor may exercise otherwise than by Order in Council, are:—those conferred by section 63, in reference to the appointment of members of the Executive Councils of Ontario and Quebec; by section 72, in reference to the appointment of Legislative Councillors in Quebec; by sections 82 and 85, in reference to the summoning and dissolving of the provincial Legislative Assembly; and by section 90, the giving or withholding of the assent of the Crown to bills passed by the Legislative Assembly. But, with regard to all of these, with the exception of the last named, the “conventions of the constitution” which, as we have shown, are as fully operative within Canada, in relation to the various governments here existing, as in relation to the parliament of the United Kingdom, require that all such acts must be done upon the advice of ministers having the confidence of the legislature of the province. As to the appointment of members of the Executive Council, the Lieutenant-Governor must *ex necessitate*, so far as the legal position is concerned, appoint, without advice, the new members upon the defeat and resignation of an entire administration, but even in such cases, the in-coming ministry or Executive Council must accept entire responsibility for the acts of the Lieutenant-Governor in connection with the formation of the new Executive Council. With regard to the giving or withholding of the assent of the Crown to bills passed by the Legislative Assembly of a province, a Lieutenant-Governor acts as a member of the Dominion executive staff, or, at all events, is supposed to be subject to “instructions” from the Governor-General, although, in practice, the supervision of provincial legislation entrusted to the Dominion executive is exercised after the event, by “disallowance,” rather than before the event, by “instructions” to withhold the Crown’s assent. See notes to section 58, *ante*, for some further observations as to the position of a Lieutenant-Governor in relation to the federal executive.

**67.** The Governor-General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant-Governor during his absence, illness, or other inability (i).

Administra-  
tion in  
absence, &c.,  
of Lieutenant-  
Governor.

(i) With this section compare section 14, *ante*, which (coupled with the Letters Patent) empowers the Governor-General to appoint a Deputy Governor-General. This section, it will be noticed, conveys no such power to a Lieutenant-Governor, and as to him, therefore, the maxim *delegatus non potest delegari* applies. We do not overlook the rule of law that a colonial legislature has as full power to alter and mould the *lex prerogativa* in the colony as has the Imperial parliament in Great Britain; but, on the other hand, (the provisions of section 92, sub-section 1) must not be overlooked. See notes to that sub-section, which expressly prohibits a provincial legislature from amending the provincial constitution "as regards the office of Lieutenant-Governor."

Reference has already been made to Attorney-General (Can.) v. Attorney-General (Ont.) (*e*), in which there arose for discussion the question of the power of a provincial assembly to vest in the Lieutenant-Governor powers in connection with the Executive government of the province other than those expressly vested in him by section 65 of the B. N. A. Act. See *ante*, p. 305. The language of the various judges who delivered opinions in that case supports the view that there is the power in a provincial assembly—to use the phrase of Boyd, C.—to impose upon a Lieutenant-Governor any executive functions "germane to the office." In view of the recent decision of the Privy Council already noted, the legislation impugned in this case would appear to have been, as Mr. Justice Burton considered it, unnecessary. A somewhat different question is suggested by this

(*e*) 20 O. R. 322; 19 O. A. R. 31.

section 67, taken in connection with sub-section 1 of section 92, conferring upon provincial legislatures power to amend the provincial constitution "except as regards the office of Lieutenant-Governor."

4 During the last illness of the late Lieutenant-Governor Campbell, an Order in Council was passed appointing a Deputy Lieutenant-Governor, and this action on the part of the provincial government gave rise to considerable discussion. It is understood that the Attorney-General of Ontario prepared a "state paper" in support of this action of his government, but this we have not seen. A Lieutenant-Governor—standing as he does in the same relation to the government of a province as the Governor-General does in relation to the government of the Dominion—has vested in him the appointment of all subordinate executive officers throughout the province, but we do not see how this could extend to authorize the appointment of a deputy. Under the B. N. A. Act this would seem to be clear, that the executive head—the person carrying on the government—of a province is to be one link in the chain of federal connection between the provinces and the Imperial government, and his tenure of office is (section 59) during the pleasure of the Governor-General, subject to certain restrictions upon the exercise of the power of removal, already adverted to. This would seem to be one of those essentials in connection with the office of a Lieutenant-Governor which a provincial legislature cannot alter, under section 92, sub-section 1. By section 62 (*ante*, p. 310) the provisions of the B. N. A. Act relating to a Lieutenant-Governor apply also to "other the chief executive officer or administrator for the time being carrying on the government of the province, *by whatever title he is designated*," and the express provision of this section 67 was hardly needed to negative the power of a Lieutenant-Governor to appoint a deputy to "carry on the government" of the province during the absence, etc., of the Lieutenant-Governor.

We have not seen the commission to the Deputy Lieutenant-Governor, and it may possibly be that it is nothing more than the appointment of a subordinate officer to perform certain of the executive functions of the Lieutenant-Governor (such, for instance, as to perform the ceremony of opening the session, and others which might be named), and is not in truth the appointment of a deputy in the proper sense of that term. There are, however, some of the duties of a Lieutenant-Governor which the B. N. A. Act expressly provides are to be performed by him, and any general delegation of the duties of his office to a deputy, would seem contrary to both the spirit and the terms of the B. N. A. Act.

**68.** Unless and until the Executive Government (i) of any Province otherwise directs with respect to that Province, the seats of Government (ii) of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Seats of Provincial Governments.

(i) "*The executive government.*"—This is a somewhat peculiar provision. The idea probably was to provide for a change of the seat of government upon a sudden emergency which might not allow of the calling together of the legislature. There is no doubt, however, that this is one of those clauses relating to the provincial constitution which may be altered by the legislature of a province, under section 92, sub-section 1. A provincial assembly, therefore, may, if so minded, take from the executive this power.

The seats of government of the provinces and territories acquired since Confederation are as follows:



Of Manitoba, Winnipeg; of the North West Territories, Regina; of Prince Edward Island, Charlottetown; and of British Columbia, Victoria.

(ii) "*The seats of government.*"—See notes to section 16, *ante*, p. 260.

### *Legislative Power* (i).

#### 1.—ONTARIO.

Legislature  
for Ontario.

**69.** There shall be a Legislature for Ontario consisting of the Lieutenant-Governor (i) and of one House (ii), styled the Legislative Assembly of Ontario.

(i) "*Legislative power.*"—The nature of the legislative power which resides in provincial legislative assemblies has been fully discussed in previous pages, and we need here only summarise the position shortly. The limitations upon that power are: First, in respect of the subject matters; Second, the territorial limitation; Third, those general and implied limitations (such as the necessary saving of Imperial sovereignty) before referred to. But, as expressed by Lord Selborne in *Hodge v. Queen* (*f*), "*within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial parliament or the parliament of the Dominion.*" See chapter IX., *ante*, p. 182. To the cases there collected there should now be added a reference to *Liquidators of Maritime Bank v. Receiver-General of New Brunswick* (*g*), in which the above passage is quoted with approval, and the Committee lay it down that "in so far as regards those matters which by section 92 were specially *reserved* for provincial legislation, the legislature of each province *continued* to be free from the control of the Dominion, and as supreme as it was before the passing of the Act." See also notes to section 58, *ante*.

(*f*) 9 App. Cas. 116.

(*g*) Times L. R. Vol. VIII., p. 677.

(ii) "*The Lieutenant-Governor.*"—Compare the language of section 17. Owing to the difference in the phraseology employed, it has been contended that the Queen does not form a constituent part of the provincial legislatures, but in the present state of the authorities, this view can hardly be said to be tenable. It is laid down by Chitty, that the Crown has a part in legislation throughout the Empire, and we have already (*h*) quoted the passage from that writer in which it is laid down, that all executive officers act under commission from, and in due subordination to, the executive head of the Empire. The Lieutenant-Governor acts under Her Majesty's commission in carrying on the government of the province over which he presides, and is as fully Her Majesty's representative as is the Governor-General in reference to the Dominion at large. The assent, therefore, given by the Lieutenant-Governor to Acts of the legislative assembly, is the assent of the Crown. This is distinctly recognized in *Théberge v. Landry*, where an Act of the Quebec legislature is described by Lord Chancellor Cairns as—"an Act which is assented to on the part of the Crown, and to which the Crown therefore is a party." For a further reference to this case see notes to section 41, *ante*, p. 288. Whether, therefore, Acts of a legislative assembly are promulgated as the Acts of the Lieutenant-Governor, by and with the advice and consent, etc., or as the Acts of the Queen, by and with such consent, would seem matter of indifference. Again we are able to quote, from the latest deliverance of the Judicial Committee of the Privy Council, language authoritatively enunciating the views above expressed:

"It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial legislature meant to vest in the provinces of Canada, the right of exercising supreme legislative powers in which the British Sovereign was to have no share" (*i*).

(*h*) *Ante* p. 252.

(*i*) *Liquidators, etc. v. Rec.-Gen. of New Brunswick*, Times L. R. Vol. VIII., p. 677. This passage immediately precedes that quoted *ante*, p. 307.

(iii) "*One house.*"—This form of a legislature was the deliberate choice of the Upper Canada representatives in the old parliament of Canada. Lower Canada (now Quebec) chose the bi-cameral form: see section 71, *post*. Nova Scotia and New Brunswick prior to Confederation had that form, and the constitution of the legislatures in those provinces was continued by the B. N. A. Act—see notes to section 88, *post*. Prince Edward Island was in like position upon its admission in 1873! Upon the formation of the province of Manitoba, a second chamber was established, but was afterwards abolished by an Act of the Manitoba legislature, 39 Vic. c. 29, under the powers conferred by section 92, sub-section 1. At the time of its admission to the Union, British Columbia had a legislature somewhat similar to that of Ontario, consisting of one house only.

It may here be noticed that no section of the B. N. A. Act makes any express provision (such as is made in reference to the Dominion parliament,—see notes to section 18, *ante*, p. 261) as to the "privileges, immunities, and powers" of the provincial legislative assemblies and the members thereof, respectively. In common with all legislative bodies they have certain incidental and inherent powers,—“such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute” (*j*). “Whatever in a reasonable sense is necessary for those purposes, is impliedly granted whenever any such legislative body is established by competent authority; for these purposes, protective and self-defensive powers only and not punitive are necessary” (*k*). This question however arises,—can they, as law-making bodies, give themselves, and their members, other and greater powers, etc., than these? It is submitted that according to the weight of authority they can do so. Indeed, some sanction is given by *Kielley v. Carson* (a case from Newfoundland),

(*j*) *Kielley v. Carson*, 4 Moo., P. C. 88.

(*k*) *Barton v. Taylor*, 11 App. Cas. at p. 203.

to the contention that usage in a colony, judicially sanctioned there, might raise a presumption that the power (*e.g.*, of committal for contempt of the colonial assembly) had been, as Forsyth puts it, duly communicated by law, or, as we would prefer to put it, had been recognized as part of the law introduced into the colony upon its settlement. But however that may be (*l*), the authorities do lay it down—although no doubt *obiter dicta*—that the power to make laws for a colony carries with it the power to make laws as to the privileges and immunities of the law-making body and its members (*m*). We have already quoted the fifth section of the Colonial Laws Validity Act, 1865,—see notes to section 35, *ante*, p. 280, and have discussed its bearing upon Dominion legislation. It is not, however, necessary to rely upon this Act, so far as concerns the position of the provincial legislative assemblies; in fact, this section of the Colonial Laws Validity Act, was passed “to remove doubt,” and as we have said, the weight of judicial authority was in favour of the view, that colonial legislatures have power to define their own privileges and immunities. The same rule would apply to a provincial legislature. It cannot, it is true, enlarge its sphere of legislative activity, but it can make laws as to how and under what safe-guards it shall do its work within the sphere assigned. Such a law would be “in relation to the classes of matters” coming within section 92 of the B. N. A. Act,—treating those classes as a whole. Moreover, sub-section 1 of section 92, giving provincial assemblies power to amend the provincial constitutions, would seem to be sufficiently wide to embrace legislation

(*l*) Only on such ground is *Reg. v. Gamble*, 9 U. C. Q. B. 546, supportable. This view is very strongly combatted by Mr. Justice Ramsay, in *Ex parte Dansereau*, 2 Cart. 165, 19 L. C. Jur. 210. His judgment was overruled by the majority of the Court, but upon the ground that an Act of the Quebec Legislative Assembly which purported to confer powers, etc., other than those annexed by the common law to a legislature, such as that of Quebec, was (contrary to his view) *intra vires*, supporting the view expressed in the text.

(*m*) See *Barton v. Taylor*, *ubi supra*, and cases there noted.



as to the privileges, etc., of the provincial assemblies and the members thereof. Such legislation could in no sense be said to effect an enlargement of their sphere of legislative activity. We do not overlook what was laid down in *Bank of Toronto v. Lambe* (n), that provincial legislatures have no inherent or reserved rights of legislation dating from a time anterior to the B. N. A. Act,—that by that Act the whole range of colonial legislative power is exhausted; our argument is based on the language of the B. N. A. Act itself, and on what, we submit, is a reasonable construction of that language.

The following provincial acts, defining the privileges, etc., of the legislative assemblies in the respective provinces, and of their members, are therefore, it is submitted, *intra vires*:

Ontario. R. S. O. (1887), c. 11, s. 37, *et seq.*

Quebec. R. S. Q. (1888), Art. 124, *et seq.*

Nova Scotia. R. S. N. S. (1884), c. 3, s. 20, *et seq.*

New Brunswick. 33 Vic. c. 33.

P. E. Island. 26 Vic. c. 15 (1863).

Manitoba. R. S. M. (1880), c. 5, s. 36, *et seq.*

British Columbia. R. S. B. C. (1888), c. 22, s. 76, *et seq.*

The position of the N. W. Territories will be found treated in Part IV., *post*.

Electoral  
districts (i).

**70.** The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two Electoral Districts set forth in the first Schedule to this Act.

(i) The representation in the different provincial legislatures has from time to time since 1867 been altered, under the power granted to the provincial legislatures by section 92, sub-section 1. Owing to the frequent revision of the statutes in the various provinces, it is not thought desirable

(n) 12 App. Cas. 575.

to encumber this work with a list of the various electoral districts for provincial purposes. So far as Ontario is concerned, they will be found set out in R. S. O. c. 7, and subsequent amendments. The number of members is now 91. 94 in

## 2.—QUEBEC.

**71.** There shall be a Legislature for Legislature for Quebec. Quebec consisting of the Lieutenant-Governor and of two Houses (i), styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

(i) "*Two houses.*"—See notes to section 69, where will be found a statement of the position of the various provinces, in regard to this matter. See also the notes to section 21, *ante*, p. 268.

**72.** The Legislative Council of Quebec shall be composed of twenty-four Constitution of Legislative Council. members, to be appointed by the Lieutenant-Governor in the Queen's name (i), by instrument under the Great Seal of Quebec, one being appointed to represent each of the twenty-four Electoral Divisions (ii) of Lower Canada in this Act referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this Act (iii).

(i) "*In the Queen's name.*"—See note (ii) to section 69, *ante*, p. 325.

(ii) "*Each of the twenty-four electoral divisions.*"—See notes to section 22, sub-section 3, *ante*, p. 272.

(iii) "*Unless the legislature of Quebec otherwise provides.*"—Up to the present time no change has been made

in the constitution of the legislative council of that province.

Qualification  
of Legislative  
Councillors.

**73.** The qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec (i).

(i) See section 23, *ante*, p. 273.

Resignation,  
Disqualifica-  
tion, &c.

**74.** The place of a Legislative Councillor of Quebec shall become vacant in the cases *mutatis mutandis*, in which the place of Senator becomes vacant (i).

(i) See sections 30 and 31, *ante*, p. 277.

Vacancies (i).

**75.** When a vacancy happens in the Legislative Council of Quebec, by resignation, death, or otherwise, the Lieutenant-Governor, in the Queen's name (ii) by instrument under the Great Seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

(i) See notes to section 32, *ante*, p. 278.

(ii) "*In the Queen's name.*"—See section 72, above, and see also notes to section 69, *ante*, p. 325.

Questions as  
to Vacancies,  
&c.

**76.** If any question arises respecting the qualification of a Legislative Councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council (i).

(i) See notes to section 33, *ante*, p. 278.

Speaker of  
Legislative  
Council.

**77.** The Lieutenant-Governor may from time to time, by instrument under

the Great Seal of Quebec, appoint a member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his stead (i).

(i) See section 34, *ante*, p. 279.

**78.** Until the Legislature of Quebec otherwise provides, the presence of at least ten members of the Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers (i).

Quorum of  
Legislative  
Council.

(i) See notes to section 35, *ante*, p. 280.

**79.** Questions arising in the Legislative Council of Quebec shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative (i).

Voting in  
Legislative  
Council.

(i) See notes to section 36, *ante*, p. 281. It will be noted that in the Senate of Canada, and the Legislative Council of Quebec, the Speaker is entitled to vote as an ordinary member, and has no casting vote; while in the House of Commons, and the Legislative Assemblies of the various provinces the Speaker has only a casting vote in case of a tie. See sections 49 and 90.

**80.** The Legislative Assembly of Quebec shall be composed of sixty-five members, to be elected to represent the sixty-five electoral divisions or districts of Lower Canada in this Act referred to, subject to alteration (i) thereof by the

Constitution  
of Legislative  
Assembly of  
Quebec.



Legislature of Quebec: Provided that it shall not be lawful (ii) to present to the Lieutenant-Governor of Quebec for assent any bill for altering the limits of any of the Electoral Divisions or Districts mentioned in the second Schedule to this Act, unless the second and third readings of such bill have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all those Electoral Divisions or Districts, and the assent shall not be given to such bill unless an address has been presented by the Legislative Assembly to the Lieutenant-Governor stating that it has been so passed.

(i) "*Subject to alteration.*"—See 53 Vic., c. 3 (Quebec), by which the membership of the legislative assembly of that province is fixed at 72.

(ii) "*It shall not be lawful, etc.*"—See notes to section 22, *ante*, where the considerations which led to this particular arrangement in the case of Quebec are adverted to. The electoral districts set out in the second schedule, are, or were at the date of Confederation, inhabited largely by protestant English, and are familiarly known as the "eastern townships."

### 3.—ONTARIO AND QUEBEC.

First Session  
of Legisla-  
tures.

**81.** The Legislatures of Ontario and Quebec, respectively shall be called together not later than six months after the Union (i).

(i) This section is now effete. The first sessions of the legislatures of Ontario and Quebec respectively were held

on the 27th of December, 1867, just in time to comply with the provisions of this section.

**82.** The Lieutenant-Governor of On-<sup>Summoning  
of Legislative  
Assemblies.</sup>tario and of Quebec shall from time to time, in the Queen's name (i), by instrument under the Great Seal of the Province, summon and call together (ii) the Legislative Assembly of the Province.

(i) "*In the Queen's name.*"—See note (ii) to section 69, *ante*. A clearer indication than this section 82 affords could hardly have been given, that the Lieutenant-Governor of a province, in his relations to the legislative assembly of such province, represents the Queen. And see also notes to section 90, *post*.

(ii) "*Summoned and called together.*"—See notes to section 38, *ante*, p. 283. What is laid down in chapter VIII., as to the exercise, by the Governor-General, of the prerogatives of the Crown in connection with the summoning, proroguing, and dissolving of parliament, is equally applicable to the case of the Lieutenant-Governor of a province. See notes to section 58, *ante*, p. 303.

**83.** Until the Legislature of Ontario<sup>Restriction on  
election of  
holders of  
offices.</sup> or of Quebec otherwise provides (i), a person accepting or holding in Ontario or in Quebec any office, commission, or employment permanent or temporary, at the nomination of the Lieutenant-Governor, to which an annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the Province is attached, shall not be eligible as a member of the Legislative Assembly of the respective Province, nor shall he sit

or vote as such; but nothing in this section shall make ineligible (ii) any person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say, the offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office (iii).

(i) "*Until the legislature of Ontario or of Quebec otherwise provides.*"—See notes to section 41, *ante*, p. 285. It is to be noticed that there is no corresponding provision with regard to the Dominion government, except so far as it may be embodied in section 41. It is difficult, in view of section 84, to see the necessity for this section 83 in the case of these provinces, except, perhaps, in connection with the first elections after Confederation. The matters referred to in the section have been the subject of legislation in all the provinces. The law, as to Ontario, will be found in R. S. O., c. 11, and, as to Quebec, in R. S. Q., articles 136 to 144.

(ii) "*Nothing in this section shall make ineligible, etc.*"—Prior to Confederation, this was the law in the various provinces, and upon its existence hinges the difference between the British constitutional system, and that of the United States: see chapter I., *ante*, p. 14, *et seq.* As to the Dominion, the law in this respect was continued by section 41, *ante*, p. 284, and as to Nova Scotia and New Brunswick by sections 64 and 88. See also section 129. Upon the admission of the other portions of British North America,

care was taken to establish therein the same system of representative parliamentary government as exists in the United Kingdom, and as existed in the various pre-Confederation provinces. See Part IV., *post*.

(iii) "*Provided he is elected while holding such office.*"—This provision is a reminder of the days when "the King's party" was accustomed to recruit its ranks by a lavish distribution of office. It applies even to the acceptance of office by members of a new administration after a general election. See *McDonell v. Smith*, 17 U. C. Q. B. 310, and *Macdonell v. Macdonald*, 8 U. C. C. P. 479, which upheld as legal what is popularly known in Canadian history as the "double shuffle" of 1858.

**84.** Until the Legislatures of Ontario and Quebec respectively otherwise provide (i) all laws which at the Union are in force in those Provinces respectively, relative to the following matters, or any of them, namely,—the qualification and disqualifications of persons to be elected or to sit or vote as members of the Assembly of Canada, the qualifications or disqualifications of voters (ii), the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections (iii) and the proceedings incident thereto, the vacating of the seats of members and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the

Continuance  
of existing  
election laws.



respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any election for a member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

(i) "*Until, etc.*"—See notes to section 41, *ante*, p. 284.

Were it not that the power of the provincial legislatures to deal with the various matters referred to in this section may perhaps depend thereon, it might be said to be effete, as the legislatures of all the provinces have long since otherwise provided.

(ii) "*Voters.*"—See note (ii) to section 41, *ante*, p. 286.

(iii) "*The trial of controverted elections.*"—See Théberge v. Landry, referred to in the notes to section 41, *ante*, p. 288. All that is laid down in the notes to that section, applies, *mutatis mutandis*, to the case of the provincial election laws.

Duration of  
Legislative  
Assemblies.

**85.** Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years (i) from the day of the return of the writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved (ii) by the Lieutenant-Governor of the Province), and no longer.

(i) "*Four years.*"—See notes to section 50, *ante*, p. 293, where this difference is noted in the position of the Dominion parliament and the legislatures of the different provinces, namely, that the former cannot alter the provisions of the B. N. A. Act in regard to this matter, while the latter (under section 92, sub-section 1), can do so.

(ii) "*Sooner dissolved.*"—See notes to section 50, *ante*, p. 293, and note (ii) to section 82, *ante*, p. 333.

**86.** There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in each Province in one Session and its first sitting in the next Session.

Yearly Session of Legislature (i).

(i) "*Yearly Session.*"—See notes to section 20, *ante*, p. 267, and see also chapter VIII., *ante*, p. 168. What is there laid down as to the duty of the Governor-General to insist upon the observance of the provisions of section 20, is equally applicable to the case of a Lieutenant-Governor under this section. There is no similar provision in the B. N. A. Act as to Nova Scotia and New Brunswick, and, so far as we have been able to find, no such provision exists by law in those provinces.

As to Manitoba, British Columbia, Prince Edward Island, and the North West Territories, see *post*.

**87.** The following provisions (i) of Speaker, Quorum, &c. this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the provisions relating to the election of a Speaker (ii) originally and on vacancies, the duties of

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the Speaker (iii), the absence of the Speaker (iv), the quorum and the mode of voting (v), as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

(i) "*The following provisions.*"—The provisions referred to are contained in sections 44 to 49 (both inclusive). Upon nearly, if not quite, all of these matters, the assemblies of the various provinces have exercised the legislative power given by section 92, sub-section 1. See notes to section 35, *ante*, p. 280, for some observations as to the powers, in this regard, of the Dominion parliament.

(ii) "*The election of a Speaker.*"—See sections 44 and 45.

(iii) "*The duties of a Speaker.*"—See section 46, and the notes thereto, where we have pointed out that the B. N. A. Act contains no further definition of the duties of a Speaker, and where a contrast is drawn between the position of a Speaker in a Canadian legislature, and that of a Speaker under the American system.

(iv) "*The absence of the Speaker.*"—See section 47, and notes.

(v) "*The Quorum and the mode of voting.*"—See sections 48 and 49; with which compare sections 35 and 36, relating to the Senate, and sections 78 and 79, as to the Legislative Council of Quebec. ✓

x.

#### 4.—NOVA SCOTIA AND NEW BRUNSWICK.

Constitutions  
of Legisla-  
tures of Nova  
Scotia and  
New Bruns-  
wick.

**88.** The constitution of the Legislature of each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act (i), continue (ii) as it exists at the Union until altered under the authority of this Act; and the

House of Assembly of New Brunswick (iii) existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected.

(i) "*Subject to the provisions of this Act.*"—That is to say, subject to the limitation of the "sphere of authority" of the legislatures in these provinces under the B. N. A. Act, and subject also to the difference in the mode of appointment of the Lieutenant-Governor. In all other respects, the constitutions of these provinces may be, from time to time, altered by the provincial legislatures, under the terms of section 92, sub-section 1.

(ii) "*Shall continue.*"—See chapter III., *ante*, p. 52, *et seq.*; also section 64 and notes thereto.

(iii) "*The House of Assembly of New Brunswick.*"—See *ante*, p. 52, where the difference in the provisions made for New Brunswick, and for Nova Scotia—see section 89—is referred to.

## 5.—ONTARIO, QUEBEC, AND NOVA SCOTIA.

**89.** Each of the Lieutenant-Govern-  
 ors of Ontario, Quebec, and Nova Scotia shall cause writs to be issued for the first election of members of the Legislative Assembly thereof in such form and by such person as he thinks fit, and at such time and addressed to such Returning Officer as the Governor-General directs, and so that the first election of member of Assembly for any Electoral District or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the

First elections (i).



House of Commons of Canada for that Electoral District.

(i) “*First elections.*”—This section is now effete. See notes to last section.

## 6.—THE FOUR PROVINCES.

Application  
to Legisla-  
tures of  
provisions  
respecting  
money votes,  
&c. (i).

**90.** The following provisions of this Act respecting the Parliament of Canada, namely,—the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year (ii) for two years, and of the Province for Canada.

(i) “*The following provisions.*”—In reference to some of the sections of the B. N. A. Act—those making provision for the constitution, both legislative and executive, of Ontario and Quebec—we have spoken of the “necessities of the draftsman,” as the reason for their introduction. See *ante*, p. 46. The insertion of this clause in the Act in its present shape might more properly be said to have been caused by the laziness of the draftsman. Applying its provisions, literally, certainly makes some of the provisions to

which it refers read very peculiarly, and affords an argument in support of the view which would belittle the position of provincial legislatures, and of the Lieutenant-Governors of the provinces. Let us take them in their order :

(1) "*The provisions relating to appropriation and tax bills.*"—See section 53. This section can only be made to affect those provinces in which a bi-cameral legislature exists. Should any of the provinces which now have one house decide to alter their constitution in this respect, it might perhaps be difficult to say which one of the two houses would answer to the House of Commons, for both houses might possibly be elective.

(2) "*The recommendation of money votes.*"—See section 54, *ante*. What has been said as to section 53 applies with equal force to any attempt to paraphrase section 54.

(3) "*Assent to bills.*"—See section 55. To paraphrase this section in accordance with the literal provisions of section 90, would indicate that, in the view of the framers of the B. N. A. Act, the Lieutenant-Governor's assent to Acts of a provincial legislature is not the assent of the Queen but of the Governor-General. The case of *Théberge v. Landry (o)*, before the Judicial Committee of the Privy Council, in which it was held that the Lieutenant-Governor's assent was the assent of the Crown, has been already referred to; see also the provisions as to the summoning of the provincial legislature of Ontario and Quebec (section 82, *ante*, p. 333), and the provisions in reference to the appointment of members of the Legislative Council of Quebec, (section 72, *ante*, p. 329). As has been frequently pointed out, all executive officers throughout the Empire act under commission direct from the executive head of the Empire, although their appointment may be through the medium of certain other executive officers. The dispute has now been given its *quietus* by the recent judgment of the

only the  
43 note  
mentioned

Judicial Committee of the Privy Council in *Liquidators, etc. v. Receiver General of New Brunswick*, Times L. R., Vol. VIII., p. 677. See the passages quoted in note (v) to section 58, and note (ii) to section 69.

(4) "*The disallowance of Acts.*"—This matter has been already fully dealt with. In chapter VIII, *ante*, p. 172, will be found a criticism of Professor Dicey's statement that the *veto* power was lodged with the Dominion Government in order to obviate the necessity for resort to the courts for the determination of these constitutional questions; and by reference to the debates upon the Quebec Resolutions, we endeavoured to point out that the framers of those resolutions knew perfectly well what the position of affairs would be, upon the carrying out of the scheme therein contained. The views of judges since Confederation, cannot of course be cited against Professor Dicey's statement. We may refer however to *Leprohon v. Ottawa* (p), in which the judges of the Court of Appeal for Ontario, laid down without hesitation, that the fact that a provincial law had not been disallowed by the Dominion authorities, could in no way affect the question as to its legal validity. Hagarty, C.J., says: "I do not see how the existence of such power can affect the constitutionality of the enactment"; and Mr. Justice Burton uses this language: "Whether allowed or not, to the extent that provincial Acts transcend the competence of the provincial legislature, they are void." To refer again to the language of the Chancellor of Ontario, in *Attorney-General (Canada) v. Attorney-General (Ontario)* (q), the power of disallowance is one which may operate both in the plane of political expediency, and in that of jural capacity. Its exercise in these days is largely confined to the former. The result is very fairly summed up by Lord Hobhouse, in delivering the

(p) 2 O. A. R. 522. See also *Reg. v. Chandler*, referred to in the notes to sec. 91, s-s. 21, *post*.

(q) 20 O. R. at p. 245.

judgment of the Judicial Committee of the Privy Council, in Bank of Toronto v. Lambe (r) :

“Their Lordships have to construe the express words of an Act of parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the confederated provinces a carefully balanced constitution under which no one of the parts can pass laws for itself, except under the control of the whole acting through the Governor-General.”

(5) “*The signification of pleasure on bills reserved.*”—See section 57 ; also chapter VII, *ante*, p. 149.

(ii) “*One year.*”—In chapter VII. (*ante*, p. 149), we have pointed out that upon the expiration of the two years allowed by section 56 for the disallowance by the Queen in Council of Dominion legislation, no act of Imperial executive authority can thereafter weaken its effect; that nothing short of “repugnant” Imperial legislation can override it. The first proposition is equally applicable to the position of the Dominion executive in reference to provincial legislation after the expiration of the one year allowed by this section 90 for its disallowance. The second proposition has no application, except in the case of section 95. Upon the expiration of the year, no power short of Imperial legislation can interfere with the operation of a provincial Act, passed in relation to a matter within its legislative competence. The Dominion legislature cannot interfere because the legislative powers of the Dominion and of the provinces are exclusive, each of the other. See chapter X., *ante*, p. 206.

## VI.—DISTRIBUTION OF LEGISLATIVE POWERS (i).

### *Powers of the Parliament* (ii).

**91.** It shall be lawful for the Queen <sup>Legislative authority of Parliament of Canada.</sup> (iii), by and with the advice and consent of the Senate (iv) and House of Commons

(r) 12 App. Cas. at p. 587.



(v) to make laws for the peace, order, and good government (vi) of Canada, in relation to (vii) all matters not coming (viii) within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty (ix) but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive (x) Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated (xi); that is to say :—

(i) "*Distribution of legislative powers.*"—As a preliminary to the study of this and the following section, chapters X. and XI. (particularly the former) should be carefully read. In chapter X. we have endeavored to collect from the cases—particularly those which have been decided by the Judicial Committee of the Privy Council—what has been authoritatively laid down as to the nature of the division effected by the B. N. A. Act, and have noted also certain general rules of construction applicable to the interpretation of these two very difficult sections of the Act.

(ii) "*Powers of the parliament.*"—These powers are not exhausted by the various sub-sections. See notes to section 41, *ante*, p. 289, and section 132, *post*. Other sections, too, have been noted in which power has been expressly given to the parliament of Canada (the same is true of the provincial legislatures as well) to alter certain provisions of the B. N. A. Act in reference to the conduct of its business. But, apart altogether from these various sections dealing with special matters, the opening words of

(section 91 clearly assign the unenumerated "~~residuum~~" of subject matters, proper to be legislatively treated by a colonial legislature, to the parliament of Canada, and various Acts of the Dominion parliament have been upheld although it was not possible to classify their provisions as falling within any of the various sub-sections of section 91.

For instance, in *Russell v. The Queen* (s), the Judicial Committee of the Privy Council upheld the provisions of the Canada Temperance Act upon this ground:

"If the Act does not fall within any of the classes of subjects in section 92, no further question will remain, for it cannot be contended . . . that, if the Act does not come within one of the classes of subjects assigned to the provincial legislatures, the parliament of Canada had not by its general power 'to make laws for the peace, order, and good government of Canada,' full legislative authority to pass it."

In *Citizens v. Parsons* (t), the power of the Dominion parliament to incorporate companies with powers extending over the whole Dominion, or over more than one province, was clearly recognized as existing under the general words of this section. The following passage is taken from the judgment of Sir Montague Smith, in delivering the judgment of the Privy Council:

"Taschereau, J., in the course of his vigorous judgment, seeks to place the plaintiff in the action against the Citizens Company in a dilemma. He thinks that the assertion of the right of the province to legislate with regard to the contracts of insurance companies amounts to a denial of the right of the Dominion parliament to do so, and that this is, in effect, to deny the right of that parliament to incorporate the Citizens Company, so that the plaintiff was suing a non-existent defendant. Their Lordships cannot think that this dilemma is established. The learned judge assumes that the power of the Dominion government to incorporate Companies to carry on business in the Dominion is derived from one of the enumerated classes of subjects, viz., 'the regulation of trade and commerce,' and then argues

that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the Dominion parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces; and the only subject on this head assigned to the provincial legislature being 'the incorporation of companies with provincial objects,' it follows that the incorporation of companies with objects other than provincial falls within the general powers of the parliament of Canada."

In Re Briton Medical and General Life Association (*u*), it was held that the Dominion Acts which require a deposit with the Minister of Finance by foreign corporations seeking to do business within Canada, were *intra vires*.

In Re Wetherell and Jones (*v*), the power of the Dominion parliament to pass an Act in reference to the taking of evidence in the various provinces for use before foreign tribunals, was upheld, as coming within the general words of this section 91. The provincial legislatures, it was held, have no power to pass such Acts, as in their operation, they are of extra-provincial pertinence, and do not relate to the administration of justice, or to property and civil rights in the province. It may be noted, too, that such laws in no way offend against the rules which have been laid down as to the territorial limitation upon the legislative power of a colony. The extra-territorial effect to be given to proceedings taken under such Acts depends upon the law of the country in which the evidence is to be used. Mr. Justice Torrance, of the Quebec Superior Court, had arrived at the same conclusion in Ex parte Smith (*w*), which came

(*u*) 12 O. R. 441. See further, on this subject of the incorporation, etc., of companies, the notes to s. 92, s-s. 10 and 11.

(*v*) 4 O. R. 713.

(*w*) 16 L. C. Jur. 140; 2 Cart. 330.

before him in 1872. He speaks of the Dominion Act in question, as an Act in relation to “a matter of international comity.”

(iii) “*The Queen.*”—See notes to sections 9, 58 and 69, *ante*.

(iv) “*The Senate.*”—See section 21, *et seq.*

(v) “*House of Commons.*”—See section 37, *et seq.*

(vi) “*The peace, order, and good government.*”—This is an expression very frequently used in Imperial Acts creative of colonial constitutions (*x*), and it also occurs in many of the commissions to the early governors. The same words are used in 34 & 35 Vic., c. 28, giving the Dominion parliament legislative power over the territories. Their very wide scope is thus referred to in *Riel v. Regina* (*y*) by Lord Chancellor Halsbury, in delivering the judgment of the Judicial Committee of the Privy Council:

“It is not denied that the place in question was one in respect of which the parliament of Canada was authorized to make such provision, but it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order and good government, cannot, as matters of law, be provisions for peace, order and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, they would be entitled to regard any statute directed to those objects, but which the court should think likely to fail of that effect, as *ultra vires*, and beyond the competency of the Dominion parliament to enact. Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country, have been authorized in Her Majesty’s Indian Empire. Forms of procedure unknown to the

(*x*) See note (*t*) p. 54, *ante*.

(*y*) 10 App. Cas. 675.



English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by these words would be of widely mischievous consequence."

(vii) "*Laws in relation to.*"—See chapter IX., *ante*, p. 194, note (c), where reference is made to the wording of the Constitution of the United States in those sections of it which confer legislative power upon Congress. As is there pointed out, the words of our statute are, ~~if comparison be in order~~, wider than the words of the American "Constitution," and the various American authorities supporting the doctrine of "implied powers" may, therefore, appear applicable, *a fortiori*, to the powers of Canadian legislatures.

In *Bennett v. Pharmaceutical Association of Quebec* (z), *Dorion, C.J.*, lays it down :

"We consider, as a proper rule of interpretation in all these cases, that when a power is given, either to the Dominion or to the provincial legislatures, to legislate on certain subjects coming clearly within the class of subjects which either legislature has a right to deal with, such power includes all the incidental subjects of legislation which are necessary to carry on the object which the B. N. A. Act declared should be carried on by that legislature."

The application, however, of this doctrine brings us face to face with the question as to the existence of "concurrent powers" and, in every case, calls for a careful consideration of those rules of interpretation (laid down by the Judicial Committee of the Privy Council in *Russell v. Reg.* (a) and *Bank of Toronto v. Lambe* (b)), which we have already discussed in chapter X.—see *ante*, pp. 212, 213, *et seq.* In truth, as a distinct, independent rule of *interpretation*, this doctrine of "implied powers" is scarcely applicable to a federal system such as ours. It is really nothing more than a

(z) 1 Dor. 336; 2 Cart. 250. See also notes to section 91, sub-section 2, and section 92, sub-section 16.

(a) 7 App. Cas. 823.

(b) 12 App. Cas. 575.

short form of expression embodying the doctrine of the supremacy of the legislature (c) in relation to those matters which, upon a reasonable and proper interpretation, can fairly be said to fall within one of the classes of subjects committed to such legislature; but, as will be at once perceived, this still leaves the question open for the application of those other rules—rules of interpretation proper—applicable for the reconciliation of apparently conflicting subsections of sections 91 and 92. Legislative *jurisdiction* must first be conceded before the doctrine of “implied powers” can apply. A reference to the various cases, in which this doctrine has been applied in terms will, we think, disclose that as a preliminary to its application, jurisdiction over the subject matter in dispute was determined. It is noteworthy that the Judicial Committee of the Privy Council have never used the phrase “*implied* powers,” preferring the other form—“*plenary* powers.” Cushing v. Dupuy (d) in reference to the scope of “bankruptcy and insolvency” legislation, is frequently referred to as illustrative of the application of this doctrine of “implied powers,” but a perusal of the judgment of the Committee in that case discloses that no such doctrine is referred to, the point decided being that procedure is an essential part of insolvency legislation—a decision as to the scope of certain words in the B. N. A. Act, not as to the nature of the legislative power of the Dominion parliament.

(viii) “*Not coming within.*”—See note (ii) to this section.

(ix) “*For greater certainty.*”—See the passage, from the judgment in *Citizens v. Parsons*, quoted *ante*, p. 207, *et seq.*, with which may be compared the language of the judges of the Supreme Court of Canada in the same case (e) and in *City of Fredericton v. Reg.* (f).

(c) See *ante*, p. 177, *et seq.*, 194, *et seq.*

(e) 4 S. C. R. 215.

(d) 5 App. Cas. 409.

(f) 3 S. C. R. 505.

(x) "*Exclusive*."—It is now settled beyond controversy that this word refers to the extent to which the legislative power of the Dominion parliament may be exercised to the exclusion of legislation by the provincial assemblies, and was in no way intended as a limitation upon the supreme legislative authority of the Imperial parliament. We have already referred to this question in chapter IV.—see *ante*, p. 67—and need here merely add a reference to some other Canadian cases in which the legislative supremacy of the Imperial parliament has—in view of this phrase in the B. N. A. Act—been questioned.

In the case of "The Farewell" (see notes to sub-section 10 of section 91, *post*), Mr. Justice Stuart, of the Quebec Vice-Admiralty Court, distinctly recognizes the continued supremacy of the Imperial parliament. He held that upon the proper construction of the Colonial Laws Validity Act, 1865, effect should be given to an Act of the parliament of Canada, even though in part repugnant to an Imperial statute, so far as its provisions do not conflict with those of such Imperial enactment (*g*).

See also the case of *Holmes v. Temple* (*h*), referred to more fully in the notes to section 91, sub-section 7, *post*, and we may also note upon this question as to the continued supremacy of the Imperial parliament, since the B. N. A. Act, the language of Ritchie, C.J., in delivering the judgment of the majority of the New Brunswick Supreme Court, in *ex parte Renaud* (*i*), a case which will be found more fully discussed in the notes to section 93, *post*.

(xi) "*The classes of subjects next hereinafter enumerated*."—In chapter X.—see *ante*, p. 211—will be found quoted the language of the Judicial Committee of the Privy Council in *L'Union St. Jacques v. Bélisle* (*ii*), in which that tribunal lays down that, in this section 91, "there is no in-

(*g*) 2 Cart. 378; 7 Q. L. R. 380.

(*i*) 2 Cart. 445; 1 Pug. 273.

(*h*) 2 Cart. 396; 8 Q. L. R. 351.

(*ii*) L. R. 6 P. C. 31.

dication *in any instance* of anything being contemplated except what may be properly described as general legislation.” We there ventured to say that just how far this rule can be or should be applied in determining the scope of each and every one of the various sub-sections of this section 91, is matter of doubt. Before venturing anything further upon this question, we shall refer to certain other cases in which the general scope of the various sub-sections of section 91 has been discussed.

In *Regina v. Mohr (j)*, the late Chief Justice Dorion intimated that, in his opinion, section 91 deals with subjects which from their nature affect the interests of the whole Dominion, and that all matters of a local nature, affecting but one of the provinces, or a portion of a province, are within the control of the legislature of the province affected thereby, unless excepted from this general rule by a special enactment, such for instance as sub-section 29 of section 91, and the exceptions particularly mentioned in section 92, sub-section 10.

In *Angers v. City of Montreal (k)*, Mr. Justice Johnson refers to the words “of Canada” as indicating the intention of the Imperial parliament, that legislation by the Dominion parliament should be legislation *for the general purposes of the Dominion*. Reference may also be had to the cases collected in the notes to section 91, sub-sections 10 and 12. See particularly *Central Vermont Railway Co. v. St. John’s*, and *The Queen v. Robertson*. In the notes to section 91, sub-section 2, will be found quotations from *Citizens v. Parsons*, and *Bank of Toronto v. Lambe*, in which the Judicial Committee of the Privy Council have intimated their view, that “the regulation of trade and commerce,” has reference only to general legislation—‘political arrangements in regard to trade, requiring the sanction of parliament; regulations of trade in matters of

(j) 2 Cart. 257; 7 Q. L. R. 183.

(k) 2 Cart. 335; 24 L. C. Jur. 259.



interprovincial concern, and it may be that they would include general regulations of trade, *affecting the whole Dominion*. In *Citizens v. Parsons*, the Committee referred to the collocation of sub-section 2 with "subjects of national and general concern," but there is nothing to indicate whether this was intended as a reference to all the sub-sections of section 91 or merely to those immediately preceding and following sub-section 2. In a recent case before the Supreme Court of Canada, involving the consideration of sub-section 19, of section 91, "*interest*," Mr. Justice Patterson refers to its collocation with sub-sections numbered from 14 to 21, both inclusive, "all of which relate to the regulation of the general commercial and financial system of the country."

Taking the language of the Judicial Committee of the Privy Council in *L'Union St. Jacques v. Bélisle* (*l*) literally it would entirely preclude the Dominion parliament from what is known as "private bills" legislation; but against such a construction, the later case of *Colonial Building Association v. Attorney-General of Quebec* (*m*), in which an Act of the Dominion parliament incorporating the appellant company was upheld, must not be over-looked. The power of the Dominion parliament to pass Acts for the incorporation of companies with objects other than provincial was in *Citizens v. Parsons* put expressly upon the general words of the opening clause of this section 91, and it may be contended, therefore, that the private bills legislation of the Dominion parliament must be limited to this residuary clause, as it has been termed, of section 91. In this connection, however, we must not overlook the concluding clause of section 91, which expressly provides that any matter coming within any of the sub-sections of section 91, is not to be deemed to come within section 92, sub-section 16, "matters of a merely local or private nature in the province"; a provision which would seem to indicate that in

(*l*) L. R. 6 P. C. 31.

(*m*) 9 App. Cas. 157.

the opinion of the Imperial parliament, matters for legislative action would come before the Dominion parliament, which upon their face, so to speak, might appear to be of a merely local or private nature in one province. Again, too, we must notice the exceptions to section 92, sub-section 10. The works and undertakings there referred to, which, by force of the exception read in connection with section 91, sub-section 29, are without doubt within the legislative competence of the Dominion parliament, are matters in respect of which it is difficult to imagine any general legislation capable of application to all alike. They are subjects which naturally call for what is known as private bills legislation.

With reference to the incorporation of companies, and Acts respecting works and undertakings within the legislative ken of the Dominion parliament, the question has arisen how far the Dominion parliament can confer upon such corporations immunity from provincial law. See particularly the cases collected in the notes to sub-section 13 of section 92, *post*. In Citizens v. Parsons (*n*), the Committee distinctly held that an insurance company, incorporated under Dominion legislation, is subject, as to the contracts of insurance entered into by it, to the laws of the province in relation to such contracts generally, as being a matter of property and civil rights in the province. By way of illustration *obiter*, the question of the applicability of the statutes of Mortmain to such a company was touched upon, and the view expressed that a company incorporated under Dominion legislation would be subject to the law of the province in this regard. In Colonial Building Association v. Attorney-General of Quebec (*o*), this view was again distinctly enunciated. Carrying these decisions to their logical conclusion, it would appear that the Dominion parliament cannot confer, upon any body incorporated by it, any power in relation to matters falling within the legislative com-

(*n*) 7 App. Cas. 96.(*o*) 9 App. Cas. 157.

petence of a provincial legislature—cannot confer, in other words, any power which it could not itself directly exercise. There is nothing in any of the other judgments of that tribunal to throw doubt upon this as being a correct enunciation of the law in regard to this very perplexing matter. A precisely similar question arises in connection with the subject of “municipal institutions” and will be found discussed in the notes to sub-section 8 of section 92.

The subject of *special* legislation has been lately brought again to the front by the judgment of the Supreme Court of Canada in a case (*p*) which arose out of the winding up of the defunct Bank of Upper Canada. Prior to Confederation the bank had become insolvent and had assigned all its property and assets to trustees. By 31 Vic. c. 17, the Dominion parliament incorporated the trustees and gave them authority to carry on the business of the bank so far as was necessary for winding up the same. By 33 Vic. c. 40, all the property of the bank vested in the trustees was transferred to the Dominion government, who became thereby seised of all the powers of the trustees. In the Court of Appeal for Ontario, the court was equally divided as to the validity of this Dominion legislation. Hagarty, C.J.O., and Osler, J.A., upheld the Acts as being within the legislative power of the Dominion parliament over “banking, the incorporation of banks,” and also over “bankruptcy and insolvency”; while Burton and Maclellan, J.J.A., held that the Acts were in relation to “property and civil rights in the province,” and could only have been validly passed by a provincial legislature. In the Supreme Court the judgment was unanimous, upholding the validity of the impugned Acts. Ritchie, C.J., held that the legislative authority of parliament over banking and the incorporation of banks, and over bankruptcy and insolvency, empowered it to pass

(*p*) Quirt v. Reg., 19 S. C. R. 510, affirming 17 O. A. R. 421 (Reg. v. Wellington).

such Acts, while of the other members of the court, Strong and Patterson, JJ., founded their judgment upon the latter power only, the three other judges not intimating the ground of their concurrence.

This legislation was undoubtedly private bills legislation, and the judgment of the Supreme Court must be taken as conclusive upon all Canadian courts, that the power of the Dominion parliament under the various sub-sections of section 91 does extend to private bills legislation so long as the subject matter legislated upon can be fairly said to fall within any of those sub-sections. There is one of the sub-sections of this section 91 which upon its face would seem to indicate that it was intended to confer power to pass private and special Acts, namely, sub-section 7, referring to "Sable Island." No argument, however, can be founded upon this sub-section, as it must evidently be read in connection with sub-section 10, and, in fact, the only legislation in reference to it is in connection with light-houses and other safeguards to navigation. See R. S. C. (1886), c. 70. 9

It is hardly necessary to say that in considering this question those other rules of interpretation which have been laid down as applicable for the reconciliation of apparently conflicting powers, must not be lost sight of; but the question now being discussed has reference, rather, to the possibility of laying down a general rule of construction applicable to section 91 and its various sub-sections, irrespective, in a sense, of section 92 and its sub-sections. We shall have occasion to again touch upon certain aspects of this question, but we may say that we make no pretence to an exhaustive treatment of it, and any views we may venture upon moot points are advanced with much mistrust.

### 1. The Public Debt and Property.

This has reference, of course, to the public debt of the Dominion, as a unit, assumed upon Confederation or since incurred, and to the public property held by the Dominion Government in trust for Canada as a whole.



In section 102, *post*, and the following sections, will be found the provisions of this Act as to the division of assets, and the distribution of revenue producing powers between the Dominion and the provinces, and any extended reference to this question will be more in order when we come to consider those provisions of the Act. We may say, however, in reference to the legislative power of the Dominion and the provinces over their respective property, and in connection with their revenue producing powers, that the absence of any provision in the various sub-sections of section 92, similar to the provision made by this sub-section 1 of section 91, does not in any way afford an argument against the full legislative authority of a provincial legislature in reference to provincial assets. The B. N. A. Act simply affects a division of the beneficial interest in the various provincial assets as they existed at the time of Confederation, but, in reference to the revenue therefrom, cannot be deemed to weaken in any way the effect of the Imperial Act, 17 & 18 Vic. c. 118, and the other Imperial Acts, giving Canadian legislatures full power of appropriation over all revenues from whatever source within the colony arising. See notes to section 126.

## 2. The regulation of Trade and Commerce.

In the leading case of Citizens v. Parsons, the meaning proper to be attributed to the language of this sub-section was discussed. In that case, the Act impugned was the Ontario Act providing for uniform conditions in fire insurance contracts. Without deciding whether or not fire insurance is a trade, the Judicial Committee of the Privy Council decided that this sub-section does not extend to the regulation of the contracts of a particular business or trade in a single province. What, in the view of their Lordships, may properly be held to come within this sub-section will be best shown by the following extract from the judgment in that case (q) :

(q) 7 App. Cas. 96.

“The words ‘regulation of trade and commerce’ in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade, ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words are not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern, affords an indication that (regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the Dominion parliament. If the words had been intended to have the full scope of which, in their literal meaning, they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91, would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest, and even 21, bankruptcy and insolvency.

“‘Regulation of trade and commerce’ may have been used in some such sense as the words ‘regulations of trade,’ in the Act of Union between England and Scotland (6 Ann., c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article V. of the Act of Union enacted, that all the subjects of the United Kingdom should have ‘full freedom and intercourse of trade and navigation’ to and from all places in the United Kingdom and the colonies; and Article VI. enacted, that all parts of the United Kingdom, from and after the Union, should be under the *same* ‘prohibitions, restrictions, and *regulations of trade.*’ Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without it being supposed that it thereby infringed the Articles of Union. Thus, the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

“Construing, therefore, the words ‘regulation of trade and commerce’ by the various aids to their interpretation above suggested, they would include political arrangements in regard

to trade requiring the sanction of parliament, regulations of trade in matters of inter-provincial concern, and it may be that they would include general regulations of trade *affecting the whole Dominion*. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contract of a particular business or trade, such as the business of fire insurance, in a single province, and, therefore, that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92."

In *Russell v. The Queen*, in the same volume (*r*), involving the validity of the Canada Temperance Act, 1878, Sir Montague E. Smith, in delivering the judgment of the Judicial Committee of the Privy Council, intimated that their Lordships—

"Must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the Act as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subjects, 'the regulation of trade and commerce' enumerated in that section, and was on that ground a valid exercise of the legislative power of the parliament of Canada."

As has been already noted (*s*), the judgment of the Privy Council proceeds upon the ground that the subject was one not falling within any of the sub-sections of section 92, and was therefore within the power of the Dominion parliament as a matter pertaining to "the peace, order, and good government of Canada," but in *Hodge v. The Queen*, involving the question of the validity of the Ontario Liquor License Act, 1877, the earlier decision is discussed and again put clearly upon the opening language

(*r*) 7 App. Cas. 829.

(*s*) *Ante*, p. 345.

of section 91. The Liquor License Act was held not to be an interference with the general regulation of trade and commerce, which belongs to the Dominion parliament, and it was also held not to conflict with the Canada Temperance Act, which had not been locally adopted. *Takes a drink before proceeding*

This is perhaps the proper place to notice the various cases which have arisen in reference to the liquor traffic, for the attacks which have from time to time been made upon provincial legislation in connection with this subject have practically ranged themselves under this sub-section. At this date, however, there is only one matter which is open to argument, the power, namely, of a provincial legislature to pass a prohibitory law for the province. *Liquor 359-3*

Owing to the emphatic pronouncement of the Privy Council in *Hodge v. The Queen* (t), in support of the power of provincial legislatures to *regulate* the sale of intoxicating liquor, and to their equally emphatic affirmation of the invalidity of the Dominion Liquor License Act, 1883 (u), it will not be necessary to discuss at any length the earlier decisions in the various provinces. *settled matter*

In Ontario, the power of a provincial legislature to empower a municipality to limit the number of tavern licenses, and to entirely prohibit the sale of liquor in places other than houses of public entertainment, was affirmed (1875) by the Court of Queen's Bench in *Slavin v. Orillia* (v), and the decision in this case may be said to embody the law upon this point as judicially recognized in the courts of that province until *Hodge v. The Queen* became the leading case. Such power was held not to infringe upon the field allotted to the Dominion parliament by the term "the regulation of trade and commerce," but to fall properly within the field covered by "municipal institutions" and "property and civil rights in the province." As

(t) 9 App. Cas. 117.

(u) Cassels, Sup. Ct. Dig. 543.

(v) 1 Cart. 688; 36 U. C. Q. B. 159.



to this last point—which sub-section of section 92 supports such legislation?—we shall have to speak later.

The question came before the Supreme Court of the province of New Brunswick, in 1875, in *Reg. v. The Justices of King's (w)*, and although the decision of the court was against the validity of the statute there impugned (36 Vic. c. 10), it was upon the ground that the Act was prohibitory in its character, allowing, as it did, a majority of the ratepayers in a municipality to entirely prevent the issue of any licenses for the sale of intoxicating liquor within such municipality. Power to make regulations for the good government of saloons, taverns, etc., such as would tend to the preservation of good order in the locality—"matters of municipal police, and not of commerce"—was conceded by Chief Justice Ritchie to provincial legislatures, but "if, outside of this, and beyond the granting of the licenses referred to in order to raise a revenue for the purposes mentioned, the legislature undertakes directly or indirectly to prohibit the manufacture or sale, or *limit the use of any article of trade or commerce*, whether it be spirituous liquors, flour, or other articles of merchandize, so as actually and absolutely to interfere with the traffic in such articles, and thereby prevent trade and commerce being carried on with respect to them . . . they assume to exercise a legislative power which pertains exclusively to the parliament of Canada." This represented the law of that province, as recognized at least until *Hodge v. Reg.* In fact, it is still a question about which opinions conflict, whether a local legislature can empower a majority of the ratepayers of a municipality to absolutely prevent the issue of *any* licenses to sell intoxicating liquor therein. As we shall see, the judgment of the Supreme Court in *Danaher v. Peters (x)*, does not go the full length of upholding such a provincial enactment.

In Nova Scotia, the question was pronounced upon by the Supreme Court of that province, in 1877, in *Keefe v.*

(w) 2 Cart. 499; 2 Pug. 535.

(x) 17 S. C. R. 44.

McLennan (*y*), and it was broadly held that a provincial legislature "is entitled to legislate with a view to regulate within the province the sale of whatever may injuriously affect the lives, health, morals, or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with that object alone, even though to a certain limited extent it should affect trade and commerce."

In Quebec, the question did not come squarely before any appellate court until very shortly before the decision in *Hodge v. The Queen* (*z*) was pronounced by the Judicial Committee of the Privy Council. The Canada Temperance Act of 1864 was in force in many of the counties of that province, and the earlier decisions in connection with this subject dealt, rather, with the question as to the position of that Act after Confederation.

In *Hart v. Mississquoi* (*a*), however, Mr. Justice Caron held that a provincial legislature cannot repeal or modify those sections of the Canada Temperance Act, 1864 (the Dunkin Act), which conferred on municipal councils the power to pass by-laws for *prohibiting* the sale of intoxicating liquors. The ground upon which this decision is put, namely, that such legislation would conflict with the powers of the Dominion government under this sub-section 2, is the debatable ground to-day. See this question also discussed in *Re Local Option Act* (*b*), in the Court of Appeal for Ontario. To the same effect is the decision of Mr. Justice Dunkin, in *Cooey v. Brome* (*c*), in which, after reviewing municipal legislation prior to 1867, he refers to section 129 of the B. N. A. Act as leaving the law as it then existed, subject to repeal or amendment by that legislature, which if the law were non-existent, would now have authority to enact it. He considered that the Dunkin Act in its

(*y*) 2 Cart. 400; 2 Russ. & Ches. 5. (*b*) 18 O. A. R. 572; see *post*.

(*z*) 9 App. Cas. 117.

(*c*) 2 Cart. 385; 21 L. C. Jur. 182.

(*a*) 2 Cart. 382; 3 Q. L. R. 170.

general scope and effect was an Act respecting trade and commerce and that, therefore, none of its provisions could be altered by provincial legislation. *Noel v. Richmond*, (1 Dor. 333; 2 Cart. 246) deals only with the question arising under section 129.

In *Blouin v. Quebec (d)*, it was held by Chief Justice Meredith that the provision of the Quebec statute (38 Vic. c. 74), fixing the hours during which taverns, etc., should be kept open, was within the competence of the provincial legislature; that the provincial legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may for this purpose *restrict* the sale of spirituous liquors. The Chief Justice holds that provincial legislation, such as above indicated, falls within the provisions of section 92, sub-section 8, "municipal institutions," such laws being in the nature of police regulations.

It was held by Mr. Justice Allyn, in *De St. Aubyn v. Lafrance (e)*, that while provincial legislatures may make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, they cannot directly or indirectly *prohibit* the manufacture or sale of spirituous liquors, or other articles of commerce or confer authority for that purpose upon municipal councils. Such legislation it was held would be in direct conflict with the powers of the Dominion parliament under this sub-section.

Finally, just prior to the decision in *Hodge v. Reg.*, the general question of the power of a provincial legislature in connection with the liquor traffic came before the Quebec Court of Queen's Bench (appeal side), in *Three Rivers v. Sulte (f)*. It was held broadly that a provincial legisla-

(d) 2 Cart. 368; 7 Q. L. R. 18 (1880).

(e) 2 Cart. 392; 8 Q. L. R. 190 (1882).

(f) 5 Legal News, 330; 2 Cart. 280. Affirmed 11 S. C. R. 25. See also *Poulin v. Quebec*, 9 S. C. R. 185.

ture has the power under "municipal institutions" to pass a prohibitory liquor law, or a liquor law which is prohibitory except under certain conditions. Reference was made to the condition of affairs in the provinces prior to Confederation, and it was held that the powers then possessed by municipal bodies in, at any rate, "two great provinces of Confederation and one of the smaller ones" (Nova Scotia), are the powers which a provincial legislature can now bestow upon such bodies. The affirmance of the decision in this case in the Supreme Court cannot be taken as an affirmance of the ground upon which the decision was based. The judgment of the Supreme Court is avowedly put as following *Hodge v. Reg.*

We have already quoted, see *ante*, p. 358, the passage from the judgment of the Judicial Committee of the Privy Council in *Russell v. The Queen* (*g*), in which that tribunal intimated that although its judgment upholding the validity of the Canada Temperance Act, 1878, was based upon the residuary clause, as it has been termed, of section 91, they nevertheless did not desire to be understood as dissenting from the position taken by the Supreme Court of Canada in *Fredricton v. The Queen* (*h*), in which the Act was upheld as a matter relating to the regulation of trade and commerce. In many quarters this was taken to mean that the Dominion parliament alone has power to legislate in connection with the liquor traffic. This view however was very decisively negatived in the judgment of the Privy Council in *Hodge v. The Queen* (*i*), upholding the validity of the Ontario Liquor License Act. While, as we shall have to point out, a good deal of uncertainty exists upon the question upon which one of the various sub-sections of section, 92, the legislative power of a provincial legislature over certain phases of the liquor traffic is to be rested, it is now clearly settled that, so long as provincial legislation stops

(*g*) 7 App. Cas. 829.

(*h*) 3 S. C. R. 505.

(*i*) 9 App. Cas. 117.



short of absolute prohibition, it cannot be taken to infringe upon the regulation of trade and commerce.

Following *Hodge v. The Queen*, the Supreme Court of Canada has since affirmed the validity of the Liquor License Acts of Quebec and New Brunswick respectively. See *Sulte v. Three Rivers (j)*, and *Danaher v. Peters (k)*.

We should, perhaps, mention here that in *Severn v. The Queen (l)*, the Supreme Court of Canada held that a provincial legislature has no power to pass an Act requiring a brewer to take out a license to sell liquor manufactured by him. The judgment of the court was founded on the view (1) that such legislation was an interference with trade and commerce; and (2) that a brewer's license is not *ejusdem generis* with the licenses particularly mentioned in section 92, sub-section 9. So far as the first ground is concerned, *Hodge v. The Queen (m)*, must be considered to deprive *Severn v. The Queen* of its support; and as to the second, the judgment of the Privy Council in *Bank of Toronto v. Lambe (n)* must be taken as an affirmance of the power of a local legislature to levy such a license fee as being a "direct" tax within the province under sub-section 2 of section 92.

The removal of the first ground of support is recognized by the judgment of the Supreme Court in *Molson v. Lambe (o)*, although that case is complicated somewhat by reason of the question as to the propriety of the issue of a writ of prohibition under the peculiar circumstances of the case. The majority of the court, however, were of opinion that the question of the validity of the Quebec License Act had been settled by the judgments of the Judicial Committee of the Privy Council. Ritchie, C.J., expresses himself thus:

"In view of the cases determined by the Privy Council since the case of *Severn v. The Queen* was decided in this court, which

(j) 11 S. C. R. 25.

(k) 17 S. C. R. 44.

(l) 2 S. C. R. 70.

(m) 9 App. Cas. 117.

(n) 12 App. Cas. 575.

(o) 16 S. C. R. 253.

appear to me to have established conclusively that the right and power to legislate in relation to the issue of licenses for the sale of intoxicating liquors *by wholesale and retail* belong to the local legislature, we are bound to hold that the Quebec License Act, 1878, and its amendments are valid and constitutional.”

Mr. Justice Gwynne expresses the view that *Severn v. The Queen* is still an authority binding upon Canadian courts, but rests his dissent from the view of the majority upon the ground that upon a proper construction of the Quebec License Act, it imposed no obligation upon a brewer, manufacturing under Dominion license, to take out a provincial license.

A further distinction will be found noted in the cases between the issue of a license to sell by retail and to sell by wholesale. The point is practically covered by *Molson v. Lambe*, but, as indicative of the difference of opinion which may still honestly exist as to certain matters in connection with the liquor traffic, we may refer to the case of *Queen v. McDougall* (*p*), in which the Supreme Court of Nova Scotia had to consider, the question of the validity of the Nova Scotia Liquor License Act. The defendant was convicted of five separate offences, each dealing with a distinct phase of the question. Three out of five judges intimated their opinion that *Severn v. The Queen* (*q*), must be taken to be overruled, and that a provincial legislature may not merely regulate the retail traffic in intoxicating liquor, but may also pass laws in relation to wholesale licenses, and licenses for brewing and distilling. Mr. Justice Weatherbe, however, expressed the view that the restriction, requiring a petition from a certain number or proportion of the rate-payers in order to obtain a license, was *ultra vires*; but, as we shall see, this view cannot now be considered law. The Chief Justice and Mr. Justice Ritchie considered *Severn v. The Queen* to be still an authority binding upon them, and that therefore the conviction of the defendant as a brewer and

distiller must, upon the authority of that case, be quashed; and the other convictions on the ground that the regulation of the wholesale trade is *ultra vires* of a provincial legislature. Mr. Justice Ritchie intimated that although there is a difficulty in drawing the line between wholesale and retail, yet as the Act itself defined "wholesale," all restrictions as to the sales of the quantities so defined, are *ultra vires*. The discussion of the authorities in that case is very voluminous, but in view of the subsequent decision of the Supreme Court of Canada in *Danaher v. Peters* (*r*), upholding the Liquor License Act of New Brunswick, it is unnecessary to discuss this case further, beyond noting that Mr. Justice Weatherbe refers to the Dominion License Act of 1883, as being substantially identical as respects its wholesale and retail clauses, with the Nova Scotia Act. Referring to the judgment of the Judicial Committee of the Privy Council, declaring the Dominion Act *ultra vires*, he treats that decision as conclusive in favor of the validity of a provincial Act.

In the two cases about to be noted, involving the question of the validity of the New Brunswick Liquor License Act, 1887, appeals were lodged by appellants who had been applicants for each of these classes of licenses respectively. Both appeals, however, were dismissed, thus upholding the validity of provincial legislation upon both branches of the traffic.

21 The question still remains, however, as we have said, as to the power of a local legislature to prohibit absolutely the sale of intoxicating liquors in the province. In the cases to which we have just referred—*Danaher v. Peters*, and *O'Regan v. Peters* (*s*)—it was contended that the New Brunswick Liquor License Act of 1887, could be utilized as a means for effecting prohibition. The Act provides that applications for licenses under the Act must be endorsed by the certificate of one-third of the rate-payers of the district

in which the license is asked ; and it was urged, therefore, that a majority of more than two-thirds could in any locality within the province, effect complete prohibition. As being the last deliverance of the Supreme Court upon this question, we venture to quote somewhat fully from the judgments. Mr. Justice Taschereau says :

“ As to the constitutionality of the Act there can be no doubt. This is not a statute to prohibit, it is a statute to regulate ; to permit under certain conditions. If these conditions are not fulfilled, it may be that the consequences are that the sale of liquor is virtually prohibited ; but that consequence cannot render the Act unconstitutional.”

Mr. Justice Gwynne says :

“ It was contended that, in effect, the Act operates as a total prohibition of the sale of liquor in the City of St. John, and that it was therefore *ultra vires* and void. . . . The argument based upon this section”—that is, the section requiring the certificate of one-third of the rate-payers—“ was, that it shewed clearly the intention of the legislature to be, that any number of rate payers in a polling sub-division, exceeding two-thirds, should have the power of totally prohibiting the sale of liquor, by refusing to sign the certificates for applicants for licenses. Then it was contended that section 31 authorizes the majority of the rate-payers in a city or incorporated town, to prohibit the sale of liquor by petitioning against the granting of licenses ; and for those reasons it was contended that the Act was, in effect, an Act for the total prohibition of the sale of liquor in the City of St. John, and therefore *ultra vires*, and void ; but there is nothing in the language of the Act which would justify us in pronouncing the intention of the legislature to have been to enact a prohibition of the sale of liquors in a municipality, or in any part thereof, under color of passing an Act on the subject of municipal regulations relating to the sale of liquors, which is a subject clearly within the jurisdiction of a local legislature. The objections which alone the Act authorizes to be urged by petition against the granting of a license to a particular person, or for a particular house, enumerated in section 15, seem to be very reasonable grounds of objection as affecting the person and place



sought to be licensed, as regards the retail trade in liquors ; and although these objections may seem to be unreasonable if applied to a person or shop for which a license to sell liquors by whole-sale is sought to be obtained, we cannot for that reason hold the object of the legislature to have been to effect prohibition of the trade of dealing in the sale of liquors, under color of an Act establishing municipal regulations affecting that trade. . . .

Defects or imperfections in the Act, or provisions therein which may be, or may appear to some to be, unreasonable, will not justify us in *pronouncing the true object of the Act to have been prohibition*, total or partial, of the trade of dealing in the sale of liquors, under pretence of establishing municipal regulations upon that subject."

Mr. Justice Patterson says :

"The power of the local legislatures to provide for the issuing of licenses for the sale of spirituous liquors, either in large or small quantities, to limit the number of licenses, and to prohibit, under penalties, the sale of such liquors without license, cannot now be treated as an open question. The contention for the present appellants is, that the New Brunswick Liquor License Act, 1887, while professing merely to deal with the subject of licenses, contains provisions which, from their inherent tendency or from the way in which they may be acted on, give the measure the effect of a prohibitory law, either as to the whole province and for all time, or as to particular localities and particular calendar years. The larger question of the power of the province to prohibit the sale of intoxicating liquors within its own borders, is not presented for discussion, and we have to deal only with questions which concede that total prohibition can be decreed only by the Dominion parliament.

. . . . The objections are too fanciful and far-fetched to be seriously discussed without denying to the local legislature the right to prescribe the conditions on which licenses can be obtained. They assume a right in every man to demand a license, ignoring the right of the legislature to limit the number."

4 A perusal of these passages discloses that, in the opinion of the members of the Supreme Court, the question of the power of a provincial legislature to enact a prohibitory law

for the province is still an open one. In the province of Ontario, the matter has been under the consideration of the Court of Appeal for that province—in Re Local Option Act (t). The case is complicated somewhat by the fact that in that province at the time of Confederation there was in existence a law which distinctly empowered municipal bodies to pass by-laws for the total prohibition of the retail liquor traffic within the municipality. These provisions had never been repealed by provincial legislation, but, in subsequent consolidations of provincial statutes, had been omitted owing to the existence of somewhat similar clauses as to local option in the Canada Temperance Acts of 1864 and 1878. The particular Act which came under the consideration of the court was 53 Vic. c. 56. As explained by 54 Vic. c. 46, s. 1, that enactment purported to be simply a revival of the provisions which had existed in the laws in force in the province prior to Confederation. It appears, however, that these pre-Confederation provisions had been repealed by Dominion legislation (u), so that it became necessary for the court to determine which legislature, Dominion or provincial, had power to pass such an enactment. The case was submitted for the consideration of the court under the provisions of 53 Vic. c. 13 (Ont.)—"An Act for expediting the decision of constitutional and other provincial questions,"—and Mr. Justice Osler declined to give any opinion upon the questions submitted. The other members of the court—Hagarty, C.J.O., Burton and Maclellan, J.J.A.—upheld the power of the provincial legislature to pass such "local option" laws; basing their judgment upon the view that such legislation falls within sub-section 8 of section 92, "municipal institutions in the province." So far as Ontario is concerned, therefore, it must be taken as settled that a local legislature can empower a municipality to pass a prohibitory by-law, so far, at all events, as relates to the retail trade in intoxicating liquors, it being held that, upon a

*him*  
Duncan

(t) 18 O. A. R. 572.

(u) See R. S. C. (1886), p. 2255.

proper construction of the statutes in question, they do not cover the wholesale trade. With regard to the construction placed upon sub-section 8 of section 92, we shall have to refer to this subject again in the notes to that sub-section.

It is material, however, to note here that the decision of the Court of Appeal in no way affirms the right of a local legislature to pass a prohibitory law of general application throughout the province. In fact, Mr. Justice Burton, while intimating his own view that such power does exist, expresses the opinion that the matter is concluded against the provinces by the judgment of the Privy Council in *Russell v. The Queen* (*v*), affirming the judgment of the Supreme Court of Canada in *Fredericton v. The Queen* (*w*), (in which the power to prohibit was distinctly classified as coming under sub-section 2 of section 91), without intimating any dissent from the view upon which that decision was based. To the like effect, in *Griffith v. Rioux* (*x*), it was held by Brooks, J., sitting in the Quebec Superior Court, that a provincial legislature cannot repeal those sections of the Dunkin Act which relate to the prohibition of the sale of intoxicating liquors; the matter of prohibition being, in his opinion, covered by the decision of the Supreme Court in *Fredericton v. The Queen*, as affirmed in *Russell v. The Queen*. ∴

The decision of the Court of Appeal for Ontario, in *Re Local Option Act* (*y*), leaves the matter in this peculiar position; that, by united action on the part of the various municipalities throughout the province, the total prohibition of the retail liquor traffic may possibly be effected, but that a provincial legislature has no power to do directly what it may empower a municipality to do. In *Hodge v. The Queen* (*z*), the Judicial Committee of the Privy Council expressed the view that the power of a provincial legislature

(*v*) 7 App. Cas. 829; see *ante*, p. 358.

(*w*) 3 S. C. R. 505.

(*x*) 3 Cart. 348.

(*y*) 18 O. A. R. 572.

(*z*) 9 App. Cas. 117.

to pass Acts in regulation of the traffic in particular commodities, exists under section 92, sub-section 8—"municipal institutions"; 15—"the imposition of punishment by fine, etc."; and 16—"matters of a merely local or private nature in the province." Further than this general statement, the judgment of that tribunal throws very little light upon the subject we are now discussing. It does not indicate clearly whether any one of these sub-sections alone supports the power, or whether the combined force of all is required to uphold such legislation. They speak of license regulations as seeming to be matters of a merely local nature in the province, and to be similar to, though not identical in all respects with, the power that belongs to municipal institutions under previously existing laws passed by the local parliaments.

"Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations, of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion parliament."

No attempt, it will be seen, is made to distinguish between sub-sections 8 and 16, of section 92. There is however the distinct expression of opinion that such matters do not fall within this sub-section of section 91.

The conclusion appears to us unavoidable that if a local legislature has power, under "municipal institutions," to authorize a municipal body of its own creation to *prohibit* the traffic in any commodity, the use or abuse of which may tend to the disturbance of the peace of the community, or to prejudicially affect its health or morals, the legislature itself must necessarily have the power to pass a general law prohibiting the traffic in such commodity throughout



all the municipalities of the province. If the conclusion be unsound the premises must go, and then we must fall back upon some class enumerated in section 92, other than "municipal institutions," as supporting the power to regulate, to the extent of prohibition, the traffic in particular commodities within a province. If regulation, conditionally prohibitive, be not an infringement of the power of the Dominion parliament to regulate trade and commerce, as those words have been construed by the various judgments, above cited, of the Judicial Committee of the Privy Council, it seems difficult to appreciate how the absolute prohibition of traffic in such commodities as above indicated can be such infringement. It cannot be by reason of the *extent of interference* with "trade and commerce" for a "regulation" of the traffic in one commodity may cause greater interference than a total prohibition of the traffic in several others.

Turning now to the traffic in commodities other than intoxicating liquor, no distinction in principle can be suggested. The fact that the Dominion Inland Revenue and Excise Acts utilize this latter traffic for purposes of taxation cannot make any difference, as is now settled by the principle of the decision of the Privy Council in *Bank of Toronto v. Lambe*, applied *e converso*. This case will be referred to more at length hereafter. We proceed now to a short review of the cases dealing with the power of a provincial legislature to legislate in relation to the traffic in other commodities.

In a number of cases, regulations as to the carrying on of certain classes of business in markets, have been held to be no infringement of the power of the Dominion parliament under this sub-section.

In *Re Harris and Hamilton* (a), the provision in the Municipal Act of Ontario empowering Municipal Councils to pass by-laws "for preventing criers and vendors of small

(a) 44 U. C. Q. B. 641.

ware from practising their calling in the market, public streets and vacant lots adjacent thereto" was upheld as *intra vires* by Mr. Justice Armour—now Chief Justice of the Q. B. D.; and this decision represents the law as it has ever since been recognized in that province.

In *Angers v. Montreal* (*b*) and *Mallette v. Montreal* (*c*), an Act of the Quebec legislature, authorizing the imposition of a license fee on butchers exercising their calling in places other than the public markets of a municipality, was held valid; and in *Ex parte Pillow* (*d*) it was held that a provincial legislature may authorize municipal bodies to pass by-laws in restraint of nuisances hurtful to public health. The attack in this last case it should perhaps be remarked was upon the ground that such legislation conflicts with the power of the Dominion parliament over "criminal law" rather than with the power to regulate trade and commerce, but the general principle of the case is the same as that involved in the others.

The question has lately come before the Supreme Court of Canada in *Pigeon v. Recorder's Court* (*e*), and the opinion of the court is contained in a sentence taken from the judgment of Mr. Justice Taschereau: "As to the constitutionality of the sections . . . there is no room for controversy."

In *Bennett v. Pharmaceutical Association* (*f*), it was held by the Court of Queen's Bench of Quebec, that the Quebec Pharmacy Act of 1875, requiring certain qualifications on the part of persons engaged in the business of selling drugs and medicines, was valid. Treating of this question, Chief Justice Dorion says:

"In the present case there is no prohibition to sell drugs or medicines in any part of the province of Quebec; the provision is merely that drugs and medicines shall only be sold by persons having the qualifications provided for by the Act.

(*b*) 24 L. C. Jur. 259; 2 Cart. 335.

(*c*) 24 L. C. Jur. 263; 2 Cart 340.

(*d*) 27 L. C. Jur. 216; 3 Cart. 357.

(*e*) 17 S. C. R. 495.

(*f*) 1 Dor. 336; 2 Cart. 250.

“ It is true that incidentally this may be considered as interfering in some degree with the sale of drugs and medicines in the province of Quebec, since it limits the number of persons who can do that business.”

In *Beard v. Steele* (*g*), the provisions of the Mercantile Amendment Act, as to the rights and liabilities of consignees and indorsees of bills-of-lading, were held to be provisions as to property and civil rights in the province, and therefore within the power of a provincial legislature. They were held not to be regulations of commerce within the meaning of this sub-section 2. In *Regina v. Taylor* (*h*), Mr. Justice Wilson—afterwards Chief Justice Sir Adam Wilson—gives more at length the considerations which had induced the court to uphold these provisions on the ground mentioned :

“ It did not seem to me, at the time, to be a regulation of trade, and it does not seem to me to be so now. It does however *affect* trade and commerce. But what enactment will not, in some way or other, affect it? If an Act were passed requiring every person who instituted a suit to give security for costs, or still further limiting the time within which to bring an action, or enacting that no execution should be issued on a judgment until a demand was first made of the sum recovered on the person liable to pay it, or giving to the holder of a bill of exchange, or promissory note, a lien for the amount due upon it on the goods of the acceptor or maker, all these provisions, and many other cases which might be put, would very much affect trade and commerce, but could they be said to be a *regulation* of it? I certainly think they could not. They would do so only incidentally ; but not more so in principle than by shutting up a trader in gaol for debt or for contempt of court, or by closing all shops at eight o'clock at night, or by the exercise of mere police powers, or by giving a public holiday. All these are lawful objects, and if they can be properly adopted they do not become unlawful, because they cannot be wholly separated from every other matter, and because they are attended with inevitable consequences. I think the provincial legislature have the power

to annex the right of contract to the right of property in the goods mentioned in a bill of lading although it does affect trade and commerce."

It should be noted, perhaps, that in the same judgment the view is expressed that the Dominion parliament would have power to pass a similar law, if it did so "as a necessary and convenient matter to be dealt with in the regulation of trade and commerce." This question of concurrent power, however, has been already touched upon (*i*) and we need not discuss this point of the case further here.

The principles enunciated in the above cases—*e.g.*, *Ex parte Pillow*, *Bennett v. Pharmaceutical Association*, and *Beard v. Steele*—support the validity of provincial Acts such as the Employers—Liability Acts and Factory Acts, which, no doubt, in a sense affect trade and commerce, but which in their intended scope relate to the civil rights of employers and employees (*j*)—to matters of a merely local or private nature in the province—and cannot be deemed regulations of general trade and commerce within the meaning of this sub-section as defined in the deliverances of the Privy Council.

The latest authoritative deliverance as to the meaning to be attached to this sub-section, is to be found in *Bank of Toronto v. Lambe* (*k*), in which it was urged that the power of the Dominion parliament to regulate trade and commerce operates to prevent a provincial legislature from levying taxes upon a bank. The Judicial Committee of the Privy Council negatived this contention in the following language:

"The words regulation of trade and commerce are indeed very wide, and in *Severn's Case* (*l*), it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But, since that case was decided, the

(i) Chapter X. *ante*, p. 214, *et seq.*

(j) See *Monkhouse v. G. T. R.*, 8 O. A. R. 637, and *Can. Southern Ry. v. Jackson*, 17 S. C. R. 316, both noted under sub-section 10 of section 92, *post*.

(k) 12 App. Cas. 575.

(l) *Severn v. Reg.*, 2 S. C. R. 70.



question has been more completely sifted before the Committee, in *Parson's Case* (m) and it was found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parson's Case*, they would be straining them to their widest conceivable extent."

3. The raising of money by any mode or system of taxation.

4. The borrowing of money on the public credit.

Compare with this sub-section 3, sub-section 2 of section 92 which assigns to provincial legislatures the exclusive power to make laws relating to "direct taxation within the province." In *Bank of Toronto v. Lambe* (n), it is said by the Judicial Committee of the Privy Council, commenting upon this provincial power, that the above sub-section 3

" . . . . . certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislature exclusively or at all, the power of direct taxation for provincial or any other purpose. This very conflict between the two sections was noticed by way of illustration in the case of *Parsons*. Their Lordships there said, 'So, the raising of money by any mode or system of taxation is enumerated among the classes of subjects in section 91; but though the description is sufficiently large and general to include direct taxation within the province in order to the raising of a

(m) *Citizens v. Parsons*, 7 App. Cas. 96.

(n) 12 App. Cas. 575.

revenue for provincial purposes, assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular power.' Their Lordships adhere to that view, and hold that as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures."

*Mutatis mutandis*, the views expressed in the above extract apply to a comparison of the above sub-section 4 with sub-section 3 of section 92 "the borrowing of money on the sole credit of the province."

Conceding the entire correctness of the view of the Judicial Committee, this further view deserves consideration, namely, that these apparently over-lapping powers do not in fact conflict at all—that the power of either government in this connection is limited to raising money for purposes connected with its sphere of authority; the choice of method allowed to the Dominion government being of the widest possible character; that of the provincial governments being limited to direct taxation within the province, because, as it is put in this very case, the power of indirect taxation would be felt all over the Dominion. Perhaps this should not be advanced as a further view; it probably represents what was in the mind of the Committee in using the expression "obviously."

Under these sub-sections have been passed our various Acts relating to Customs and Excise duties—see R. S. C. c. 32, 33 and 34;—and Acts in relation to Finance—see R. S. C. c. 28 and 29. Note also chapter II., *ante*, p. 35, *et seq.*, for an account of the practical surrender to colonial legislatures of full control over their own revenues and tariffs.

See also the cases collected under section 92, sub-section 2, *post*.

## 5. Postal service.

## 6. The Census and Statistics.

We have not found any expression of judicial opinion as to the scope of this sub-section 6, ~~although a number of~~ questions suggest themselves. It must be construed so as to exclude provincial legislation upon whatever matters are properly included in it; and (it seems to us that any construction other than "the Census, and Statistics in relation thereto" would land us in difficulties. So construed, it has reference to the census required to be taken every ten years by section 8 of the B. N. A. Act, and to the compilation of statistics in reference to nationality and creed, the increase or decrease of population, and kindred matters. In the Quebec Resolutions the words "and statistics" do not appear. No wider interpretation is needed to enable the Dominion parliament to institute enquiries and compile statistics as to any matters upon which information is desired in order to intelligent legislation upon the various subjects committed to its legislative care. Acts authorizing such proceedings would be laws "relating to" such subjects. Any wider interpretation would have the absurd effect of condemning provincial legislatures to legislate in the dark upon many very important matters.

## 7. Militia, Military and Naval Service, and Defence.

See notes to section 15, *ante*, p. 259. This is perhaps the matter in which, above all others, the Imperial authorities continue to exercise supervision over colonial legislation, and in respect to which, also, the British parliament passes Acts of express colonial application. The Commander-in-Chief of the Canadian forces is appointed by the Imperial authorities. At the same time, the laws relating to the volunteer forces of Canada are largely of Canadian enactment, but, as we have said, they are very carefully scrutinized by the Imperial authorities; the idea being

to have a uniform system of defence throughout the Empire.

In Holmes v. Temple (o), it was held (in Quebec) that the provisions of the Imperial "Army Act, 1881," do not apply to Canada, so as to make persons not connected with the active Militia of the Dominion liable in respect of acts which are offences under the Imperial Act but not under the Militia Act of Canada. The whole subject of Imperial defence is of such a complicated nature, and so many of the provisions of Imperial Acts are in force in all portions of the Empire, that it is not thought desirable to discuss the matter at any length here (p). We simply note the only case which has been decided in Canada since Confederation (q) in reference to the subject, and in reference to this case it should be remarked that, apparently, Mr. Justice Chauveau held the view that the legislative authority of the Dominion parliament under this sub-section is "exclusive" as between that parliament and the parliament of the United Kingdom—a view which cannot of course be maintained. He treats the English Army Act of 1881 as applicable in Canada only to the extent to which it is expressly made so by the Canadian Militia Act (31 Vic. c. 40). The proper position is clearly this: so far as Imperial legislation upon this subject is, within the meaning of the Colonial Laws Validity Act, 1865, made applicable to the colonies generally, or to Canada in particular, any Canadian legislation repugnant thereto, in whole or in part, must be held to be void and inoperative to the extent of such repugnancy, but not otherwise—that is to say, in so far as Canadian legislation is supplementary to and not inconsistent with Imperial legislation upon the subject, this sub-section 7 distinctly affirms the authority of the Dominion parliament, as distinguished from provincial assemblies, to pass such legislation.

(o) 8 Q. L. R. 351; 2 Cart. 396.

(p) See Todd "Parl. Govt. Brit. Col." 274, *et seq.*

(q) See *Reg. v. Schram*, 14 U. C. C. P. 318 (1864), noted *ante*, p. 65.



8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

Compare section 92, sub-section 4.

In *Evans v. Hudon* (*r*), in the Superior Court of Quebec, it was held that a provincial legislature has no power to declare liable to seizure the salaries of employees of the Federal government, the exemption of such salaries being "a matter of public order."

Much the same question came before the courts in Ontario in the case of *Leprohon v. Ottawa* (*s*), in which it was held by the Court of Appeal, reversing the decision of the Court of Queen's Bench, that provincial powers of taxation do not extend over the salaries of the executive staff of the Dominion. The decision is based, not so much on the limited effect of sub-section 2 of section 92, as upon the broader ground that the provincial legislature has no power to impose a burden upon any of the instruments by which the Dominion government is carried on, and cannot invest a municipal corporation of its own creation with a power which it cannot itself directly exercise. The arguments in support of the contrary view will be found in the opinions delivered in support of the judgment of the Court of Queen's Bench. The question has never been further litigated. This case is noteworthy for the free use, made by the judges, of the decisions of the Supreme Court of the United States upon similar questions which have arisen there. The whole matter is one of much interest as indicative of the distinct separation of the governmental organization of the Dominion and of the provinces respectively, and of their mutual independence.

So far as the Dominion government is concerned, the severance of the tie of territorial connection with one province and the creation of a distinct, exclusively federal, territory as the seat of the Dominion government, would,

to some extent, do away with this difficulty. As the law now stands, in, at least, Ontario and Quebec, federal officials are exempt from provincial burdens, while for provincial officers there is no escape from the burden of federal tariffs.

As dealing with a somewhat kindred topic, see the notes to section 125. *post.*

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping (i).

11. Quarantine and the establishment and maintenance of Marine Hospitals.

(i) "*Navigation and Shipping*."—This is one of those subjects in respect of which colonial legislative power is limited by reason of the existence of Imperial legislation upon the subject applicable to, and in force in, the different colonies of the Empire. It is beyond the scope of this work to attempt any treatment of this large branch of English jurisprudence; we must simply note the line of division between the Dominion parliament and the provincial legislature in respect of the various matters which may appear in some aspects to fall within this sub-section, and, in other aspects, within some one or more of the various sub-sections of section 92.

The line of argument which led the Judicial Committee of the Privy Council in *Citizens v. Parsons* (t), to limit sub-section 2, "the regulation of trade and commerce," to regulations relating to general trade and commerce, would appear to be equally applicable to limit this sub-section 10. See sub-sections 9, 11, and 13, all of which would be unnecessary if the wider meaning were intended to be given to this sub-section 10. See also section 92, sub-section 10, and section 108, and the various cases there noted.

(t) 7 App. Cas. 96.

In *MacMillan v. The South-West Boom Company (u)*, it was held by the Supreme Court of New Brunswick that a provincial enactment (37 Vic. c. 107) authorizing the erection of booms in a navigable river, does not conflict with the power of the parliament of Canada with respect to "navigation and shipping"; those words being used in the sense in which they are used in the several Acts of the Imperial parliament, relating to navigation and shipping, in the Act of the Dominion parliament, 31 Vic. c. 58, namely, as giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion, and not excluding, for all purposes, provincial jurisdiction over navigable waters. Allan, C.J., says:

"A local legislature, therefore, clearly, has a right to incorporate a Boom Company, where its objects, as in this case, are entirely provincial, and the erection of the booms, piers, etc., necessary for giving effect to such Act of incorporation, are undoubtedly local works, necessary and useful only for this lumbering business in one section of the province—the river Miramichi. The Acts then are entirely within the powers given to the provincial legislature unless the construction of the word, "navigation," is as has been contended for the plaintiff's counsel; for, in that case, the general power over local works and undertakings must yield to the particular power given to the Dominion parliament over the subject matter of navigation. But I think that it is not the proper construction of the term, and therefore the Acts in question are not *ultra vires*."

It was held in *McDougall v. Union Navigation Co. (v)*, that the power to incorporate navigation companies, the operations of which are limited to a particular province, belongs exclusively to the legislature of such province.

In *Normand v. St. Lawrence Navigation Co. (w)*, the grant, by the province of Quebec, of a water lot extending

(u) 1 Pug. & Burb. 715; 2 Cart. 542. Such an enactment however cannot authorize any *obstruction* to navigation. See *post*.

(v) 21 L. C. Jur. 63; 2 Cart. 228.

(w) 5 Q. L. R. 215; 2 Cart. 231.

into deep water at the mouth of the River St. Maurice was held to be valid, subject to the implied restriction that the grantee should not use his powers in such a way as to interfere with the requirements of navigation.

In Queddy River Driving Boom Co. v. Davidson (x), it was held by the Supreme Court of Canada affirming the judgment of the Supreme Court of New Brunswick, that a provincial legislature cannot authorize such an obstruction of a navigable stream as would create a public nuisance. In that case there was no Dominion legislation upon the subject to alter the law as it existed in New Brunswick at the date of the Union, and the true effect of the decision would seem to be contained in an observation of Mr. Justice Strong:

“The Queddy river is shown to be a navigable tidal river, and the appellants have obstructed the navigation and thus committed an act which is *prima facie* a public nuisance, and which the respondent shows to be especially injurious to him as a riparian proprietor. The respondent was therefore entitled to an injunction to restrain the continuance of the obstruction, unless the appellants were able to show some legal justification for the interference with the navigation of the river caused by the construction and maintenance of these booms; they, however, show nothing but an Act of the provincial legislature of New Brunswick.”

Following Bank of Toronto v. Lambe (y), the Supreme Court of Canada has held in Longueuil Navigation Co. v. Montreal (z), that a provincial legislature can impose direct taxation—*e.g.*, a fixed annual tax of \$200.00—upon ferry men and ferry companies. Ferries plying entirely within one province would, in any case, fall within sub-section 10 of section 92, although no doubt they would have to conform to the provisions of any Act respecting “navigation and shipping” passed by the Dominion parliament within the proper scope of this sub-section.

(x) 10 S. C. R. 222; see notes to section 129, *post*, and also *ante*, p. 200.

(y) 12 App. Cas. 575.

(z) 15 S. C. R. 566.



In *Central Vermont Railway Co. v. St. John* (a), the Supreme Court of Canada treated as almost beneath notice the contention that the boundaries of a municipality can not be extended by provincial legislation so as to include therein part of a navigable river.

“If it is beyond controversy that navigable rivers are *for purposes of navigation* under the control of the parliament of Canada, it is not less clearly established that the provinces have, upon these same rivers, the right to exercise all municipal and police powers, so long as their legislation creates no hindrance to navigation.”—*Per Fournier, J.*, at p. 297.

In “*The Picton*” (b), it was held by the Supreme Court of Canada that, under section 101 (see *post*) and this sub-section 10, the Dominion government was within its powers in creating the Maritime Court of Ontario, having jurisdiction over certain matters relating to navigation and shipping.

In the case of “*The Farewell*” (c), before the Vice-Admiralty Court of Quebec, it was held by Stuart, J., that the Dominion parliament can confer upon Vice-Admiralty Courts existing in Canada under Imperial legislation, jurisdiction in any matter relating to navigation and shipping within the territorial limits of the Dominion, and that any such Act is to be given full effect so far as its provisions are not repugnant to Imperial legislation (d).

Compare the cases which have arisen under this sub-section with those under sub-section 12; and see also note (xi) to the opening clause of section 91, *ante*, p. 350.

## 12. Sea coast and inland Fisheries.

Note the curious error into which Lord Chancellor Selborne fell, in *L'Union St. Jacques v. Bélisle* (e), in not apply-

(a) 14 S. C. R. 288.

(b) 4 S. C. R. 648.

(c) 7 Q. L. R. 380; 2 Cart. 378.

(d) See Chapter XI. *ante*, p. 230; also Todd, “Parl. Govt. Brit. Col.,” p. 149, *et seq.*

(e) L. R. 6 P. C. 31.

ing the word “ fisheries ” to “ sea coast.” He speaks of the whole of the sea coast being put within the exclusive cognizance of the Dominion legislature.

See notes to section 108, and cases there cited.

The different views that may be taken of the scope of the various sub-sections of sections 91 and 92 are nowhere better illustrated than in the litigation (*f*) which arose out of the grant of a lease of a salmon fishery by the Minister of Marine and Fisheries under authority of a Dominion Act. The *locus in quo* included part of the Miramichi river, in New Brunswick, above the ebb and flow of the tide, and the lease in question purported to give an exclusive right to fish in that part of the river, regardless of the rights of the riparian proprietor. After much litigation, the invalidity of the lease, and of the clause of the Dominion Act under which it was made, was finally declared by the Supreme Court of Canada. On the subject of the rights of riparian proprietors generally, the opinions expressed by the different judges are interesting and instructive; but, confining our attention to the constitutional point involved, the Supreme Court held that the scope of this sub-section 12 is properly limited to—

“ subjects affecting the fisheries generally, ) tending to their regulation, protection, and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and the increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; ”

—that the Dominion parliament could not interfere with the rights of property (with all its incidents) vested in the riparian proprietors—whether the province, or individual owners—further than laws within the above limits might

(*f*) Terminating in *The Queen v. Robertson*, 6 S. C. R. 52.

curtail their exercise; and that, having no power to interfere directly, the Dominion parliament could not authorize others to interfere with those rights. Such legislation would be confiscation, not regulation.

### 13. Ferries between a Province and any British or Foreign country or between two provinces.

Such undertakings, as being of extra-provincial operation, fall naturally into the classes of matters confided to the parliament of Canada. We need not, however, discuss the sub-section at length here, as the whole subject will come up for consideration under sub-section 10 of section 92.

### 14. Currency and Coinage.

See R. S. C. (1886) c. 30, which contains our legislation upon this subject. In *Lynch v. Canada N. W. Land Co. (g)*, Patterson, J. refers to this and the six following classes as relating "to the regulation of the general commercial and financial system of the country at large."

### 15. Banking, incorporation of banks, and the issue of paper money.

The scope of this sub-section has been under consideration by the Judicial Committee of the Privy Council in *Bank of Toronto v. Lambe (h)*. It was there "earnestly contended" that this sub-section operates to prevent a province from levying direct taxation (under section 92, sub-section 2) upon a bank; but this view was negatived:

"Their Lordships think that this contention gives far too wide an extent to the classes in question; they cannot see how the power of making banks contribute to the public objects of the province where they carry on business can interfere at all with

(g) 19 S. C. R. 204; see notes to s-s. 19, *post*.

(h) 12 App. Cas. 575; see Chapter X., *ante*, p. 213.

the power of making laws on the subject of banking, or with the power of incorporating banks. . . . Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their powers to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion; but whatever power falls within the meaning of class 2 is, in their Lordships' judgment, what the Imperial parliament intended to give; and to place a limit on it, because the power may be used unwisely, as all powers may, would be an error and would lead to insuperable difficulties in the construction of the Federation Act."

The provisions of the Dominion Banking Act (34 Vic. c. 5; R. S. C. c. 120), empowering banks to hold warehouse receipts as collateral security for the re-payment of monies advanced to the holders of such receipts, was held to be *intra vires*, and no interference with "property and civil rights" further than the fair requirements of a banking Act would warrant—*Merchants Bank v. Smith (i)*; with which compare *Beard v. Steele (j)*, cited in the notes to sub-section 2, *ante*, p. 374.

In *Windsor v. Commercial Bank (k)*, it was held in New Brunswick that a provincial legislature has authority to enact a law to impose a tax on the Dominion notes held by a bank, as portion of its cash reserve, under the Dominion Act relating to banks and banking. The correctness of this decision would seem to be settled by the judgment of the Judicial Committee of the Privy Council in *Bank of Toronto v. Lambe*.

(i) 8 S. C. R. 512.

(j) 34 U. C. Q. B. 43.

(k) 3 Cart. 377; 3 Russ. &amp; Geld. 420.



Regina v. County of Wellington (*l*), exhibits the difference in view which is still possible as to the scope of this sub-section, the Court of Appeal for Ontario being equally divided in opinion on the constitutional point involved—the validity of a Dominion Act providing for certain matters in connection with the winding up of the defunct Bank of Upper Canada. The facts are sufficiently set forth in note (*xi*), *ante*, p. 354, and see also notes to section 92, sub-section 13. In the Supreme Court, Chief Justice Ritchie was alone in upholding the legislation under this sub-section.

16. Savings' Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes (*i*).

19. Interest (*ii*).

20. Legal tender.

(*i*) "*Bills of exchange and promissory notes.*"—This sub-section is very frequently noted as limiting the otherwise wide scope of sub-section 13 of section 92 "property and civil rights in the province." The law upon this subject has recently been codified. See 53 Vic. c. 33.

(*ii*) "*Interest.*"—In *Ross v. Torrance* (*m*), it was held that a provincial legislature has no power to authorize a municipal corporation to charge a percentage increase on over-due taxes, the so-called increase being but another name for interest. The same question came before the courts of Manitoba in the case of *Schultz v. Winnipeg* (*n*), where a similar provincial Act was also held invalid. It is difficult, however, to agree with these decisions, as there is

(*l*) 17 O. A. R. 421; and in Sup.]Ct. (*sub nom.* Quirt v. Reg.) 19 S. C. R. 510.

(*m*) 2 Cart. 352; 2 Legal News, 186.

(*n*) 6 Man. L. R. 35

no necessary connection between interest and percentage, and the power to impose a penalty (by whatever name it may be called) to enforce prompt payment of municipal taxes would seem to be clearly within the power of the provincial legislature under section 92, sub-section 15.

See *Royal Canadian Insurance Co. v. Montreal Warehousing Co.* (o), in which it was held that a provincial legislature may give a local corporation authority to borrow money at any rate of interest already legalized as to other persons who have the right to borrow. Having reference to the views of the Privy Council as expressed in *Citizens v. Parsons* (p), it is submitted that this sub-section is limited to the regulation of the legal rate of interest throughout the Dominion in the absence of *special* contract, or to the passing of what are known as usury laws, in case, in the general interests of the Dominion, it is deemed advisable to put such laws upon the statute book. The question, however, is one of some difficulty. Dominion legislation upon the question is contained in R. S. C. c. 127.

Since the above was written, the report of the judgment of the Supreme Court of ~~Canada in *Lynch v. The Canada North-West Land Co.*~~ (q) has appeared. The cases above noted are distinctly overruled and local legislation in reference to the imposition of an additional percentage on over-due taxes held not to fall within the scope of this sub-section.

In reference to the general scope of the section Chief Justice Ritchie says:

“It is obvious that the matter of interest which was intended to be dealt with by the Dominion parliament was in connection with debts originating in contract, and that it was never intended in any way to conflict with the right of the local legislature to deal with municipal institutions in the matter of assessments or taxation, either in the manner or extent to which the local legis-

(o) 2 Cart. 361; 3 Legal News, 155.

(p) 7 App.Cas. 96.

(q) 19 S. C. R. 204.

lature should authorize such assessments to be made ; but the intention was to prevent individuals under certain circumstances from contracting for more than a certain rate of interest and fixing a certain rate when interest was payable by law without a rate having been named."

Following a number of American authorities, quoted in the judgment, the Chief Justice points out that municipal taxes are not, *per se*, debts or contractual obligations, and then proceeds :

"Does not the collocation of No. 19 with the classes of subjects as numbered 18 and 20 afford a strong indication that the interest referred to was connected in the mind of the legislature with regulations as to the rate of interest in mercantile transactions and other dealings and contracts between individuals, and not with taxation under municipal institutions and matters incident thereto? The present case does not deal directly or indirectly with matters of contract. The Dominion Act expressly deals with interest on contracts and agreements as the first section conclusively shows."

Referring to the rule that the true nature and character of the legislation in the particular instance under discussion must be considered (*r*), he points out that the Act there in controversy had for its "primary matter" municipal taxation and not "interest." It will be seen that the Chief Justice founds the jurisdiction of a provincial legislature to pass the Act in question upon section 92, sub-section 8. He speaks of municipal matters as "necessarily" embracing the levying of taxes for municipal purposes. We shall have to refer to this again when dealing with that sub-section. Here we have to note that the Chief Justice clearly points out that the percentage increase is in reality an extra tax and not "interest." Mr. Justice Taschereau characterizes the addition as a "penalty," and Mr. Justice Patterson says :

"We find that article associated with others numbered from 14 to 21, all of which relate to the regulation of the general com-

(1) See *ante*, p. 212.

mercial and financial system of the country at large. . . . .  
 We must see what the thing really is. It is clearly something which the Manitoba tax-payer who does not pay his taxes when due is made liable to pay as an addition to the amount originally assessed against him or his property. It is a direct tax within the province in order to raise a revenue for provincial purposes, and as such is indisputably within the legislative authority of the province. . . . .

“The imposition may, not improperly, be regarded as a penalty for enforcing the law relative to municipal taxation, and in that character it comes directly under article 15 of section 92.”

The question whether such an imposition can in any sense be properly called interest, is referred to and it is pointed out that under the impugned Act the addition is of an arbitrary percentage not accruing *de die in diem*; but, without expressing a decisive opinion upon this point, the opinion of the court, Mr. Justice Gwynne dissenting, was, that such an imposition does not, at all events, fall within the scope of this sub-section 19. ✱

## 21. Bankruptcy and Insolvency.

The extent to which the Dominion parliament, by legislation under this sub-section, is empowered to interfere with “property and civil rights in the province,” or with “procedure” in the courts of a province, came up for consideration before the Judicial Committee of the Privy Council, in the case of *Cushing v. Dupuy* (s), and was disposed of in the judgment of that tribunal in these words:

“It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen’s Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of the province. The answer to these objections

(s) 5 App. Cas. 409.



is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some special mode of procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, *so far as a general law relating to those subjects might affect them.*"

The words italicised are important as indicating the view of the Committee as to the scope of the sub-section, as authorizing, namely, a general insolvency or bankruptcy law. There is now no such law in existence in Canada, and the power of a provincial legislature, in the absence of Dominion legislation, to pass laws for the equitable distribution of the estate of a man whose assets are insufficient to meet his liabilities, has necessarily arisen, and with this question has also arisen the larger one as to the existence of "concurrent" powers of legislation in the Dominion parliament and provincial legislatures; as to which see chapter X., *ante*, p. 216, and note (xi) to section 91, *ante*, p. 350. *Quirt v. Reg. (t)*, in which a *special* Act in reference to the winding up of the affairs of a particular bank was upheld by the Supreme Court of Canada as within the scope of this sub-section, is sufficiently referred to in the note last mentioned.

The Privy Council had had occasion to consider this sub-section in an earlier case—*L'Union St. Jacques v. Bélisle (u)*—which came before them in 1874. The scope of the sub-section is clearly indicated in the judgment, where, speaking of the various sub-sections of section 91, and of

(t) 19 S. C. R. 510.

(u) L. R. 6 P. C. 31.

this sub-section in particular, the following language occurs :

“There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation ; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing Faillite, bankruptcy and insolvency, all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, *according to rules and definitions prescribed by law*, including of course the conditions on which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.”

The latter part of this extract supports what has been said in an earlier chapter (*v*) in reference to bankruptcy and insolvency being legal relations, the creation of which out of any given combination of circumstances, is alone in the power of the Dominion parliament. In the absence of any such legislation, it is difficult—in view of the scope attributed to sub-section 13 of section 92 (*w*), “property and civil rights in the province”—to see on what ground provincial legislation, making provision for the distribution of a man’s estate among his creditors, and for his discharge from liability upon his contractual obligations, can be impugned. In view, however, of the difference of opinion among the judges who have had to consider this question, this view, we need hardly say, is put forward with much diffidence.

In *Crombie v. Jackson* (*x*), that was held to be a valid provision, in the Insolvent Act in force at that date (1874), which obliged a person, making claim to any part of the property of an insolvent transferred to the possession of his

(*v*) See *ante*, p. 215.

(*w*) See the notes to that sub-section.

(*x*) 34 U. C. Q. B. 575.

assignee under the Act, to proceed, under the Act, by summary proceedings before a county judge. In our view, these cases involving enquiry as to the validity of individual sections of former Insolvent Acts are not of much practical importance; they would assist of course in the framing of a new Act; but the important cases are those in which provincial Acts or clauses of provincial Acts have been impugned on the ground that their provisions are in the nature of insolvency legislation. At the same time, in the face of the divergence of view which exists upon the subject, we should hardly be justified in overlooking the former class of cases.

In *Peak v. Shields* (*y*), was involved the question of the validity of the 136th section of the Insolvent Act of 1875, which provided that a debtor, afterwards becoming an insolvent under the Act, who had fraudulently obtained goods on credit knowing himself unable to meet his engagements, might be subjected to imprisonment for two years unless the debt and costs were sooner paid. The opinions delivered were very conflicting, some of the judges expressing the view that the clause was legislation regarding procedure in civil matters, others that it was properly described as insolvency legislation, and others again that it might be upheld as criminal legislation. The broader question involved in the case, namely, the power of a colonial legislature to legislate respecting wrongs committed abroad, was treated of in chapter IX., *ante*, p. 189.

In *Re Eldorado Union Store Company* (*z*), it was held in Nova Scotia, and again in *Shoolbred v. Clark* (*a*), it was unanimously held by the Supreme Court of Canada, that the Dominion Winding-up Acts are insolvency legislation, and are properly made applicable to companies incorporated under provincial Acts. In *Allen v. Hanson* (*b*), it was held

(*y*) 8 S. C. R. 579; 6 O. A. R. 639; 31 U. C. C. P. 112.

(*z*) 6 Russ. & Geld., 514.

(*a*) 17 S. C. R. 265.

(*b*) 13 S. C. R. 667.

that these Winding-up Acts also apply to companies incorporated under Imperial Acts, the power in such case being limited, of course, to dealing with the realization and distribution of the assets in Canada. See the earlier case of *Merchants Bank v. Gillespie (c)*, in which it was held that the Winding-up Act then in force, did not, upon the proper interpretation of it, apply to such an Imperial Company.

In *Clarkson v. Ontario Bank (d)* and other cases reported with it, the validity of certain legislation by the Ontario legislature (R. S. O. c. 124—"an Act respecting assignments and preferences by insolvent persons")—was in question. The court was equally divided. The opinions of Hagarty, C.J.O., and Osler, J.A., who held the Act *ultra vires*, proceed upon the broad ground thus expressed by the Chief Justice :

"It is to all intents a law for the Judicial administration of an insolvent's estate by means unknown to the common law, and conferring rights on an assignee in addition to, and beyond all rights assigned to him by the debtor."

On the other hand, Burton and Patterson, J.J.A., who upheld its validity, support their opinions by pointing out that the various clauses, examined in detail, deal with matters within the legislative competence of a provincial legislature under sub-section 13 of section 92. property and civil rights. In view of this difference of opinion it can be easily understood, therefore, that the view we have attempted to express in an earlier chapter is advanced with much mistrust. In all these cases there will have to be a pronouncement by the Judicial Committee of the Privy Council or an amendment to the B. N. A. Act, before the position of impecunious debtors is satisfactorily settled.

In *Clarkson v. Ontario Bank*, Burton and Patterson, J.J.A., both expressed some doubt as to section 9 of the Act then in question, which section did not itself come im-

(c) 10 S. C. R. 312.

(d) 15 O. A. R. 166.



mediately in question in the case. It provided that an assignment, under the Act, for the general benefit of creditors, should take precedence of all judgments and executions not completely executed by payment; and afterwards, in *Union Bank v. Neville (e)*, it was held by Chief Justice Sir Thomas Galt, to be *ultra vires*, as being insolvency legislation.

“The question now is whether or not the assignee is entitled to take these goods out of the possession of the sheriff. It is manifest that the assignor himself has no such authority, and it appears to me that, that being the case, he could confer no such right on his assignee. By the words of the statute itself, it is plain that the provisions are to have effect only in cases of insolvent debtors or persons on the verge of insolvency; consequently, to attribute to an assignment under the statute a power to remove goods in the hands of the sheriff under execution against an insolvent, must, in my opinion, be considered as an Act relating to “bankruptcy and insolvency.”

To the same effect—from the other standpoint—we may note the case of *Kinney v. Dudman (f)*, decided by the Nova Scotia Supreme Court, upholding the validity of section 59 of the Insolvent Act of 1869, which provided that a judgment not completely executed, should as against an assignment under that Act, create no lien or privilege upon the property of the insolvent.

In *The Queen v. Chandler (g)*, it was held by the Supreme Court of New Brunswick, that those provisions, in what are commonly known as Indigent Debtors Acts, providing for the examination of a confined debtor and for his discharge from imprisonment upon proof of indigence, and of the absence of fraudulent dealings with his property, cannot be passed by provincial legislatures. This case arose in 1868, and the judgment of the court was founded upon views, as to the wide scope of this sub-section, which cannot in view of the later authorities be now considered

(e) 21 O. R. 152.

(f) 2 Russ. & Ches. 19; 2 Cart. 412.

(g) 2 Cart. 421; 1 Hannay 556.

a correct exposition of the law. The words “bankruptcy and insolvency” were interpreted as covering all legislation as to impecunious debtors even entirely apart from any system of bankruptcy and insolvency legislation, and, in this view, the Act in question was held to be an insolvent Act (*h*). In another aspect, however, the case may well be referred to, as being one of the earliest decisions emphatically enunciating the doctrine that, under the B. N. A. Act, it necessarily devolves upon courts of justice to inquire into the validity of post-Confederation Canadian legislation. The fact that the Governor-General had not disallowed the provincial Act in question, was decisively held by the court to be immaterial, upon an inquiry as to its legal validity. ✕

Upon the question as to the scope of this sub-section 21, *The Queen v. Chandler* has never been overruled, but, in subsequent cases in New Brunswick, the wide view upon which the decision in the early case proceeded has evidently and necessarily been modified. Prior to the Union, the New Brunswick legislature had passed an Act extending the gaol limits—an Act affecting confined debtors. This Act was not to come into operation until April 1st, 1868, but before that date, and after Confederation, it was repealed by a subsequent enactment. The New Brunswick Supreme Court intimated that there was nothing in the point that the Act was one relating to insolvency, and that therefore the provincial legislature was within its powers in repealing it (*i*). And, again, in *Armstrong v. McCutchin* (*j*), the Supreme Court of New Brunswick held that an Act of the legislature of that province abolishing imprisonment for debt was not *ultra vires*, as respects a party not shown to be a trader, subject to the Dominion Insolvent Act. Ritchie C.J., says:

(*h*) See the remarks of Mr. Justice Burton in *Clarkson v. Ontario Bank*, *ubi supra*; and see also notes to sec. 92, s.-s. 14, *post*.

(*i*) *McAlmon v. Pine*, 2 Cart. 487; 2 Pug 44.

(*j*) 2 Cart. 494; 2 Pug. 381.

“ But while legislation on the subject of imprisonment for debt may be, under some circumstances, involved in legislation on bankruptcy and insolvency, and therefore fit matter to be dealt with by the Dominion parliament, it by no means follows that in no circumstances can a local legislature legislate with reference thereto. On the contrary, there may be many cases where the abolition or regulation of imprisonment for debt is in no way mixed up with or depending on insolvency. In this case, in which application has been made for discharge under a local Act, the party does not appear by the affidavits to be in anywise amenable to the Insolvent Act of 1869, nor a party who could be brought within the operation of that Act; nor, so far as he is concerned, or as applicable to his case, are the clauses of the local Act under which he seeks the discharge, in any way in conflict with that Act. The defendant simply appears in the position of a person not subject to the Insolvent Act of 1869, and whom the legislature has declared shall not be proceeded against for recovery of a debt by imprisonment, without reference to any question of solvency or insolvency; therefore there is no reason why he should not receive the benefit of an Act passed by the local legislature for regulating the procedure in civil suits in relation to the civil rights of parties in the recovery of debts. So far therefore as the defendant is concerned—and we limit our decision to the particular circumstances of this individual case—there is no reason why the Act should not have full force and effect. *Regina v. Chandler*, which was so much pressed on us, is, we think, entirely distinguishable from the present case.”

See also, *Re De Veber (k)*, in which an Act of the New Brunswick legislature, providing that as against an assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the date of its filing, was held to be *intra vires*. The provinces down by the sea are not at one upon this question. In *Johnson v. Poyntz (l)*, it was held by the Nova Scotia Courts that a provincial legislature could confer upon a newly created provincial court, jurisdiction to entertain an application for

(k) 21 N. B. R. 401; 2 Cart. 552.

(l) 2 Cart. 416; 2 Russ. & Geld. 193.

the discharge of an insolvent debtor under a provincial Act passed prior to Confederation, such legislation, it was held, not coming within this sub-section; while, on the other hand, in the case of *Munn v. McCannell* (*n*), the Supreme Court of Prince Edward Island held to be *ultra vires*, a provision in the Indigent Debtors Act of that province, providing for the discharge of an insolvent debtor.

The language above quoted of Sir Montague Smith in delivering the judgment of the Privy Council in *Cushing v. Dupuy* (*n*) would seem to cover the various matters discussed in the above cases. As relating to "civil rights in the province" a provincial legislature has full power to legislate thereon, subject to the operation of any general insolvency legislation passed by the Dominion parliament.

In *Murdoch v. Windsor & Annapolis Railway Co.* (*o*), Mr. Justice Ritchie, sitting as Equity Judge, held invalid, as an infringement upon the powers of the Dominion parliament under this sub-section, an Act of the Nova Scotia legislature, entitled "An Act to facilitate arrangements between Railway Companies and their creditors." The Act provided that the company might propose a scheme of arrangement between the company and its creditors, and file the same in court, and that thereupon the court might, on application by the company, restrain any action against the company, upon such terms as such court might see fit. The Act also provided that notice of filing the scheme should be published, and that thereupon no process should be enforced against the company without leave of the court. Mr. Justice Ritchie considered the Act as one which could have reference only to a company which was insolvent. That a company, having become insolvent, should have the power, in order to settle with all its creditors alike, of declaring itself such, and that on such declaration the remedies of creditors should be suspended, would not be unreason-

(*n*) 2 P. E. R.

(*n*) 5 App. Cas. 409.

(*o*) 3 Cart. 368; Russ. Eq. Rep. 137.



able: but that the legislature should give to a company, solvent and able to meet all its liabilities, the power of staying all proceedings on the part of their creditors, by merely presenting and filing a scheme of arrangement with them, would be incomprehensible. The legislation, in his view, must have been passed on the assumption of the insolvency of the company. And, upon this view of the Act, he held it *ultra vires*. The same judge held in *Re The Wallace-Heustis Grey Stone Company (p)*, that the Nova Scotia Winding-up Act, was *intra vires*. It made provision for the winding-up of any company where a resolution to that effect was passed by the company, or where the court so ordered at the instance of a contributor, on it being made to appear that such order was just and equitable. The Act could be enforced, although no debts were due by the company, but could not be called into operation by a creditor. Such an Act, it was held, had no necessary relation to bankruptcy and insolvency, but was an Act respecting property and civil rights in the province.

The decision in *Murdoch v. Windsor & Annapolis Railway Co.* must be considered overruled by the judgment in *Re Windsor & Annapolis Railway (pp)*, in the Nova Scotia Supreme Court, in which the same Act was upheld so far as it provided for the confirmation of a scheme, propounded by the company under the Act, for cancelling certain debentures, and for the allotment of new stock in lieu thereof bearing a low rate of interest. The decision, however, it should be noted, is placed upon the ground that the Windsor & Annapolis Railway Company was a local work or undertaking within the meaning of section 92, sub-section 10, and that so far as any such local undertaking is concerned, the impugned Act was within the legislative competence of the provincial legislature, that the scheme propounded by the company had no relation whatever to

(p) 3 Cart. 374; Russ. Eq. Rep. 461.

(pp) 3 Cart. 387; 4 Russ. & Geld. 312.

the insolvency of the company, and was simply a scheme for changing the form of the stock. In this view of the case, reliance was placed upon *L'Union St. Jacques v. Bélisle* (q), and the Act in its relation to local undertakings upheld upon the authority of that case.

We may also refer to *Re Briton Medical and General Life Association* (r), cited in notes to section 91, *ante*, p. 346 as the Act there referred to might, perhaps, be said to fall within this sub-section 21. The deposit required by that Act to be made by all corporations desiring to do business in Canada, was held to be, upon the true construction of the Act, a special fund applicable in case of insolvency for the benefit of Canadian policy holders only.

In *McClanaghan v. St. Ann's Mutual Building Society* (s), it was held that the Dominion parliament has no power to pass an Act providing for the liquidation of all building societies, *whether solvent or not*, in the province of Quebec.

In *Coté v. Watson* (t), it was held by the Superior Court of Quebec that a provincial legislature has no power to impose a tax on the sum realized from the sale of an insolvent's effects, or to impose upon an assignee under that Act, or his agent, any penalty for not taking out a license to sell by auction the goods of the bankrupt. In view of *Bank of Toronto v. Lambe*, this case cannot be considered law.

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## 22. Patents of invention and discovery.

We have already had occasion to point out that this sub-section embraces what may now be considered almost

(q) L. R. 6 P. C. 31. See notes to s. 92, s.-s. 16.

(r) 12 O. R. 441.

(s) 2 Cart. 237; 24 L. C. Jur. 162.

(t) 2 Cart. 343; 3 Q. L. R. 157.

a distinct branch of jurisprudence—patent law (*u*). The language of the Judicial Committee in *Cushing v. Dupuy* (*v*), as to the necessity for regulating “procedure” in connection with the handling of estates under bankruptcy and insolvency legislation, applies with almost equal force to legislation under this sub-section 22. At the same time we have to note that comparatively few cases have arisen calling for a decision as to the line of division which properly marks out the sphere of provincial legislative authority in connection with patent litigation, but so far as the decisions go they uphold the authority of the Dominion parliament to regulate procedure in such cases. L

In *Aitcheson v. Mann* (*w*), the Queen’s Bench Divisional Court held, affirming the decision of Boyd, C., that section 24 of the Patent Act of 1872, which requires that the trial of an action for the infringement of a patent must be tried in the court nearest the defendant’s residence or place of business, was *intra vires*.

In *Mousseau v. Bate* (*x*), it was held that proceedings in the nature of a *Sci. Fa.* to set aside letters patent of invention issued under a Dominion statute, cannot be instituted in the name of a provincial Attorney-General, but can only legally be brought by the Attorney-General for Canada. In connection with this case, reference should also be had to *Regina v. Pattee* (*y*), in which the late Master in Chambers (Mr. Dalton, Q.C.), held that the Attorney-General of Ontario was the proper officer to grant a fiat for the issue of a writ of *Sci. Fa.* In another view, the case is noteworthy as containing one of the earliest expressions of opinion in reference to the necessary co-extension of the executive and legislative functions of a provincial government. So far as concerns this sub-section, however, the judgment is expressly limited to the case of a subject domi-

(*u*) *Ante*, p. 236.

(*v*) 5 App. Cas. 409.

(*w*) 9 P. R. (Ont.) 473.

(*x*) 27 L. C. Jur. 153; 3 Cart. 341.

(*y*) 5 P. R. (Ont.) 292.

ciled in the province, seeking to avail himself of the peculiar privileges of the Crown, in order to the assertion of his own private interests, and the Master in Chambers desired that he should not be understood as speaking of a case where the Crown itself seeks to avoid a patent.

In *Re The Bell Telephone Co. (z)*, it was held to be a proper exercise of the powers of the Dominion parliament under this Act, to provide that in case of dispute arising as to the validity of a patent, such dispute should be settled by the Minister of Agriculture, or his Deputy, whose decision should be final. It was held that by the Act a court or judicial tribunal was constituted, and that the Dominion parliament had power to constitute such a court, under section 101 (see *post*). This question has been already discussed to some extent in chapter XI., *ante*, p. 230, and further reference to it will be found in the notes to section 101.

### 23. Copyrights.

This is hardly the place to discuss the somewhat peculiar position in which, under the combined operation of Imperial and Canadian legislation, Canada is placed in relation to this question of copyright. Our power along this line is subject to limitations owing to the existence of Imperial legislation in force in Canada. *Smiles v. Belford (a)*, in which the situation is graphically described by Moss, J.A. (afterwards C.J.O.), is of importance to our subject in another aspect, namely, as affirming the legal supremacy of the Imperial parliament, even over colonies possessed of legislatures of their own, and as limiting the term "exclusive" in this section 91 of the B. N. A. Act, as referable merely to the power of the Dominion parliament as distinguished from that of the provincial legislatures (*b*). It is hardly

(z) 7 O. R. 605.

(a) 1 O. A. R. 436; see also *Anglo-Canadian Music Publishers v. Suckling*, 17 O. R. 239.

(b) See *ante*, p. 67, and note (x) to sec. 91, *ante*, p. 350.



conceivable that any question can arise as between the Dominion and the provinces upon this subject, except, perhaps, in relation to "procedure" in copyright litigation, should the Dominion parliament legislate along this line. See note to the last sub-section (22).

## 24. Indians and lands reserved for the Indians.

The proclamation (a) which followed upon the Treaty of Paris contained provisions designed to protect the aborigines "in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved to them, or any of them, as their hunting grounds." In the celebrated case of the St. Catharines Milling Co. v. The Queen (b), it was held by the Judicial Committee of the Privy Council, that the interest of the Indians under this proclamation was "a personal and usufructuary right, dependent upon the good will of the sovereign. . . .

There has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished." From time to time Indian tribes had surrendered their title to portions of this reserved territory, usually upon terms which secured to them a more definite right of occupation of some small subdivision of it. These smaller tracts were known as "Indian reserves." In Church v. Fenton (c), it was held by all our courts that the above sub-section 24 applied only to these, and not to the larger indefinite areas covered by the proclamation of 1763; but this view is distinctly negatived by the Committee in the case above referred to. Under the holding of that tribunal, the power of the Dominion government is a power of legislation and admin-

(a) See Houston, "Const. Doc. of Canada," p. 67.

(b) 14 App. Cas. 46.

(c) 5 S. C. R. 239; 4 O. A. R. 159; 28 U. C. C. P. 384.

istration in respect of Indians, and the lands reserved for them over both these larger areas and the more restricted areas of the "Indian reserves" (so called) until the surrender and extinguishment of the Indian title. The chief matter in dispute in the case was as to the beneficial interest in these lands after such surrender and extinguishment. The Committee gave effect to the contention put forward on behalf of the province of Ontario, that to the provinces accrued the right to "a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title." Upon such surrender they fall into the category of "public lands belonging to the province," mentioned in sub-section 5 of section 92. It would appear, however, that where, upon a surrender, certain rights of hunting and fishing throughout the surrendered territory were still reserved to the Indians, "with the exception of those portions of it which may, from time to time, be required or taken up for purposes of settlement, mining, lumbering, or other purposes," the question of "the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes," is still an open one. In that case, there was no pretence of a reservation to the Indians of any right to timber in the territory surrendered, and a permit to cut timber issued by the Dominion government was held invalid. It occurs to one, however, that it would be an easy matter to arrange such terms of conditional surrender, with such reservations of beneficial interest to the Indians, as would practically prevent the provinces from dealing with the land; but whatever is surrendered accrues to the benefit of the province in which the territory is situated. Subject to the burden of the Indian title (with whatever legislative and administrative powers exist in the Dominion government by reason of the existence of that Indian title) the beneficial interest in these lands passed on Confedera-

tion to the provinces, the fee, of course, remaining in the Crown. See further notes to section 102, *et seq.*

## 25. Naturalization and aliens.

By the Imperial Naturalization Act, 1870, it is enacted that "all laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges or any of the privileges of naturalization to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law. . . ."

While, therefore, as between the Dominion and the provinces, this subject is, by this sub-section, exclusively with the former, no legislation by the parliament of Canada can make an alien a British subject *quoad* the Empire: it can do no more than give him, within the confines of the Dominion, the privileges or some of the privileges of naturalization. Where any question arises as to the national *status* of a person domiciled in a colony, such question must be determined by the law of England, whilst the rights and liabilities incident to that *status* must, in Canada, be determined by laws passed by the parliament of Canada (*d*). The power of a provincial legislature to make laws relative to "property and civil rights in the province" must obviously be read subject to Dominion legislation under this sub-section. It is for the Dominion government to say whether or not, within Canada, an alien is to lie under any disability and that government can insist that throughout the Dominion an alien may, upon conforming to the provisions of any Act in that behalf passed by the parliament of Canada, become, *quoad* Canada, a naturalized British subject and enjoy all the privileges accorded by the laws of the provinces to British subjects.

(*d*) *Donegani v. Donegani*, 3 Knapp, P. C. C. 63; *re Adam*, 1 Moo. P. C. C. 460.

Connected with this subject is the question of the territorial operation of Canadian legislation discussed in chapter IX., *ante*, p. 185, *et seq.* Just as Canadian legislation cannot invest an alien with the character of a British subject outside Canada, so it cannot visit upon natural born British subjects resident in Canada any penalty for acts committed without the Dominion; for, without the Dominion, they are—*quoad* Canada—British subjects only and their *status* as citizens of Canada is nought. *A fortiori*, legislation in reference to the acts of aliens abroad would be invalid.

## 26. Marriage and Divorce.

Compare section 92, sub-section 12. No case has arisen in our courts in reference to the line of division between the Dominion parliament and the local legislatures on this subject of marriage; but this sub-section and sub-section 12 of section 92, will be found frequently compared and contrasted, and inferences drawn therefrom as to the proper principles of interpretation to be applied to the various other sub-sections of sections 91 and 92 (*e*). Judging from provincial legislation since Confederation, it would appear to be conceded that the scope of the first branch of this sub-section is limited to legislation as to the *status* merely of husband, wife, and issue. So far, the scope of the second branch has been limited in practice to private bills legislation. No court for the trial of matrimonial causes has yet been established.

## 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

It will be advisable to defer consideration of the exception—the constitution of courts of criminal jurisdiction—

(*e*) See *Citizens v. Parsons*, 7 App. Cas. 96; *City of Fredericton v. The Queen*, 3 S. C. R. 505.



until we reach sub-section 14 of section 92, and to confine our remarks upon this sub-section to “criminal law” and “procedure in criminal matters.” The subject has been already adverted to in chapter XI., *ante*, p. 235, *et seq.*, to which reference should be had.

In its widest and strictly legal sense (*f*) the term “criminal law” would include all that class of matters—offences against the provisions of provincial law—covered by sub-section 15 of section 92, and, the jurisdiction being in each case exclusive, the meaning of the term must be here limited.

It will facilitate our enquiry if we refer shortly to the sources of our criminal law—using that term in its widest sense—and to the position at the time the Union took effect. As the basis we take the common law of England. In chapter V. we have endeavored to point out to what extent English common and statutory law was deemed to be introduced into the various provinces of British North America. As to the common law of England relating to crimes, their trial and punishment, no discussion was necessary. That law was undoubtedly in force in the maritime provinces and in Quebec as then constituted. By the Quebec Act, 1774 (*g*), the criminal law of England was to continue to be administered in the province, and be “observed as law as well in the description and quality of the offence as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted.” As was pointed out, in Upper Canada the question of applicability seems not to have been considered open in determining the operation within that province of English criminal law (*h*), but in the maritime provinces this question had to be considered in all cases, criminal as well as civil.

But, the “criminal law of England” had become in those days largely statutory, and no distinction in principle can

(*f*) See *Reg. v. Boardman* and *Reg. v. Roddy*, *post*.

(*g*) 14 Geo. III. c. 83.

(*h*) See *ante*, p. 123.

be pointed out as separating statutory criminal law from the old common law upon the subject of crimes, their trial and punishment. All sorts of regulations were laid down to guide the daily conduct of men, and their observance was enforced by penalties, inflicted *in personam* or *in rem*, until the severity of English law became notorious. As Sir Thomas May points out (i), the criminal code down to the reform era of the 'thirties was largely protective of the rights of property, regardless, in such case, of any question of moral turpitude. Such was the law introduced into the colonies of British North America, and down to Confederation there existed no necessity for distinguishing the various parts of the criminal code, whether as passed for the putting down of public wrongs or as directed toward the upholding of private rights. "Crimes" was a most comprehensive term, and its definition by Richards, C.J., in 1868 (j) may be taken as a correct exposition of the law as it stood at the date of Confederation:

"When a party may be punished for an offence against a public Act of a public nature, for which he may be tried summarily and a penalty imposed, the proceeding to recover such a penalty is a criminal proceeding, . . . then the offence for which the penalty was imposed must be a *crime*."

This, as we have said, covers enactments such as those which, by the express provision of sub-section 15 of section 92, a provincial legislature may pass "for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." So far as concerns legislation since Confederation, it may be now taken as clearly established that provincial penal laws within the limits defined are not "criminal law," nor is the procedure for their enforcement "procedure in criminal matters" within the meaning of this sub-section 27. As to the "common law" upon the

(i) May's "Const. Hist. of Eng." Vol. III. p. 393, *et seq.*

(j) In *Re Lucas & M'Glashan*, 27 U. C. Q. B. 81; see also *Reg. v. Roddy*, 41 U. C. Q. B. 291.

subject of crimes, their trial and punishment, there seems to be a consensus of judicial opinion that, under this sub-section this became—so far as still extant in the different provinces—a body of Dominion law. But how about the great body of provincial statutory “criminal” law—as it would then be properly termed—in force in the different provinces at Confederation? Upon this question there is no expression of judicial opinion, so far as we have been able to find, and yet it seems to us clear that section 129 of the B. N. A. Act (see *post*), makes a definite division of that whole body of existing “criminal” law, and that, without doubt, whatever enactments prior to Confederation could now, were they non-existent, be passed by a provincial legislature must, since the Union, be deemed to be a body of “provincial” law, and the procedure for their enforcement must be regulated by provincial statutes applicable, generally, to prosecutions under post-Confederation provincial Acts. We may say, also, that much may be advanced in favor of the view that even the common law of England upon this subject—so far as still extant in Canada—is capable of division along a similar line (*k*), but judicial opinion is, as we have said, in favor of the view that this is by the B. N. A. Act assigned in its entirety to the parliament of Canada. We now proceed to examine the cases which have involved consideration of this sub-section, first, however, remarking that the notes to sub-section 15 of section 92 should be read in connection with what is here laid down, for nearly every case has involved a comparison between that sub-section and this.

In *Reg. v. Boardman* (*l*), Chief Justice Richards, delivering the judgment of the court, refers to a passage from the judgment of Martin, B., in *Attorney-General v. Radloff* (*m*), in which that judge, speaking of “the intrin-

(*k*) See *per* Osler, J.A., in *Reg. v. Wason*, 17 O. A. R. 221, at p. 241.

(*l*) 30 U. C. Q. B. 553.

(*m*) 10 Exch. 96.

sic and essential nature of the act itself”—smuggling—says “that it cannot be denominated a ‘crime’ according to the ordinary and common usage of language, and the understanding of mankind.” Chief Justice Richards says:

“I refer to this language . . . as indicating the popular idea of criminal law, in which view it may have been used in the statute.”

but, without enlarging further upon this suggestion, he held that, at all events, whatever comes properly within sub-section 15 of section 92 must be excluded from the “criminal law” confided to the parliament of Canada by this sub-section 27. A clause in the Liquor License Act of Ontario directed against any person who, having violated the Act, should compromise the offence, and against any person who should be a party to such compromise, was upheld. But in *Regina v. Lawrence* (*n*) it was held that a provision of the same Act, that any person who, in a prosecution under the Act, tampers with a witness, should be guilty of an offence under the Act, and liable to a penalty, and regulating the mode of enforcing such penalty, was *ultra vires* of a provincial legislature, because the offences dealt with are offences *at common law*. Harrison, C.J., says:

“There are many acts, not being crimes, which are triable before, and punishable by, magistrates, which, although called offences, are not crimes, and which by the proper legislative authority may be made the subject of summary magisterial jurisdiction, either with or without appeal, but these are not to be mistaken for acts in themselves crimes, and the subject of indictment, and of conviction under indictment, either at the common law or by statute. Such acts as these may by the provincial legislature be made the subject of punishment by fine, penalty or imprisonment, when this is done for the purpose of enforcing any law of the province made in relation to any matter coming within any of the classes of subjects exclusively assigned to the provincial legislatures. . . . The constitutionality of this clause is called in question because it is affirmed that the

(*n*) 43 U. C. Q. B. 164, affirming judgment of Gwynne, J.



acts with which it deals are, and each of them is, the subject of an indictment by the criminal (*sic*) law, and so not the subject of the exercise of power by the provincial legislature. If this contention be well founded in fact we are of opinion that it is a good contention in law." ✓

Upon a review of the authorities it was held that the offence legislated against by the Act in question, was an offence which might be the subject of an indictment at common law, and was therefore beyond the power of a provincial legislature. *Regina v. Boardman*, and *Regina v. Lawrence* are hard to reconcile. The former can be upheld only on the view that the compounding of a misdemeanor is not an offence by the common law, and can, therefore, for the purpose of securing proper enforcement of a provincial law, be made punishable by provincial legislation.

To the like effect, in *Regina v. Shaw (o)* it was held by the Court of Queen's Bench in Manitoba, that keeping a gambling-house is an offence against the common law, and that consequently it can only be dealt with by the parliament of Canada, and cannot be made an offence by a provincial Municipal Act or by a by-law passed under the authority of such Act. Mr. Justice Killam says:

"It was an offence at common law to keep a gambling house. This offence, it appears to me, comes within the subject of criminal law referred to in section 91, sub-section 27 of the B. N. A. Act. That term must, in my opinion, include *every act or omission which was regarded as criminal by the laws of the provinces when the Union Act was passed*, and which was not merely an offence against a by-law of a local authority. If this were not to be the rule of construction, more difficulty than ever would arise in drawing the line between the jurisdiction of the Dominion and the provincial legislatures. This gives us one clear line of demarcation which it would be dangerous to obliterate. I think it must be deemed to be one line which was intended to exist. How far parliament can ex-

clude provincial or municipal legislation by creating new crimes is a question.

“This being the view which I take, I think that the act of keeping a common gaming house cannot be made an offence by provincial statute or by municipal by-law, but that it can be punished only as an offence against the general criminal law by indictment or such other procedure as the parliament of Canada may provide.”

It will be noticed that the language of this judgment goes beyond what was necessary to the decision of the case, and the part italicised conflicts with sec. 129 of the B. N. A. Act. See *ante*, p. 410. On appeal, however, to the full Court, Taylor, C.J., intimates his entire concurrence with the view expressed by Killam, J. He speaks of the offence as one which might have been dealt with under the Dominion statute R. S. C. c. 158. Referring to *Regina v. Wason (p)*, before the Court of Appeal for Ontario, he points out that the offence created by the provincial Act there impugned formed no part of the criminal law previously existing, and that the apparent object of the Act was to protect private rights rather than punish public wrongs. Mr. Justice Bain, referring to the same case, says :

“The remarks of all the judges clearly imply that had the Act in question been one that was punishable as a crime under the general criminal law of the Dominion, the matter would have been *ultra vires* of the legislature.”

Mr. Justice Dubuc did not dissent from the judgment of the court, but expressed his doubts in these words :

“It is objected that keeping a gambling house is a criminal offence over which the Dominion parliament has exclusive jurisdiction. It is, undoubtedly, a criminal offence ; but I am inclined to think that such houses might also be regarded as centres of disorder and immorality in the community, which municipal corporations have a right and even a duty to suppress.”

We might remark, in reference to this case, that the

ultimate decision of the point raised by Mr. Justice Dubuc will depend somewhat upon the scope given to section 92, sub-section 8—"municipal institutions in the province." If the views expressed by the Court of Appeal for Ontario in *Re Local Option Act* (*q*), receive final sanction, and the term "municipal institutions" be held to cover, in the newly acquired provinces, what the Court of Appeal has held it to cover in the province of Ontario, then the view to which Mr. Justice Dubuc inclined would be supported by the fact that prior to Confederation, the power to put down such establishments was vested in municipal bodies, in Upper Canada at least. If, however, the powers of a municipal body cannot, so far as those powers are conferred by a provincial legislature, extend beyond the limits of the powers directly exerciseable by such legislature (*r*) under the other sub-sections of section 92, it will have to be considered whether any sub-section does support the grant to a municipal body of what have been called police powers. This must be discussed later, but, in either view, the point raised by Mr. Justice Dubuc would necessitate consideration of what was said by the Privy Council in *Russell v. Reg.*, that, in one aspect, a subject may fall within section 91, and, in another, within section 92, and of how far that principle can apply to the determination of the scope of this sub-section 27 and sub-section 15 of section 92.

Provincial statutes regulating the killing and possession of game at certain seasons of the year, were held by the Court of Queen's Bench in Manitoba, not to fall within this sub-section (*s*). At common law, no prohibition whatever exists in regard to the taking of game at any season of the year; no public general statute of the Dominion purports

(*q*) 18 O. A. R. 572; see notes to s. 91, s-s. 2, *ante*. p. 369 and to s. 92, s-s. 8, *post*.

(*r*) See *Leprohon v. Ottawa*, 2 O. A. R. 522, referred to in the notes to s-s. 8 of s. 92, *post*.

(*s*) *Reg. v. Robertson*, 3 Man. L. R. 613; see also notes to s-s. 16 of s. 92, *post*.

to make criminal interference with wild animals; and therefore the matter is under the B. N. A. Act, left to be dealt with by each province as a matter of a merely local or private nature. This view is suggested by the judgment of the court in that case; that, if by reason of inter-provincial migration of birds and other game, the subject should become one of the Dominion or quasi-national importance, it would then be in order for the Dominion government, if deemed advisable, to enact laws, making acts, which might tend to the extermination or undue decrease of game, criminal.

That provincial legislatures have exclusive authority to regulate the procedure in prosecutions for offences against provincial statutes is now recognized as the law in all the provinces.

In *Regina v. Roddy* (*t*), it was held that a provincial statute could so far create a crime as to make applicable to the prosecution therefor the rules of evidence, procedure, etc., laid down by Dominion legislation, to the exclusion of any provincial law; but this decision has been clearly overruled by *Regina v. Wason* (*u*). This case will be found referred to more at length in the notes to sub-section 15 of section 92. It is a clear authority that the provincial legislatures have full power to regulate procedure in all prosecutions arising under provincial Acts. As will be seen, the authorities in the other provinces are to the same effect.

On the other hand, in *Regina v. Lake* (*v*), it was held that a provincial legislature has no power to enact that an offence against a Dominion Act (in that case the Canada Temperance Act), may be treated as, and be proceeded upon, under a provincial statute; and in *Regina v. Eli* (*w*), also a prosecution under the Canada Temperance Act, it was held

(*t*) 41 U. C. Q. B. 291; see *Reg. v. Bittle*, 21 O. R. 605.

(*u*) 17 O. A. R. 221.

(*v*) 43 U. C. Q. B. 515.

(*w*) 13 O. A. R. 526.



that all procedure connected with the infliction of punishment for offences against that Act must be fixed by the Dominion parliament, and that no appeal lay to the Court of Appeal under the procedure as to appeals laid down by provincial statutes. To the same effect are many dicta of judges in the other provinces in cases involving the other aspect of this question of procedure. The latest enunciation of the rule is in *The Queen v. De Coste (x)*, in which the Supreme Court of Nova Scotia held that a provincial legislature has no power to authorize the removal by *certiorari* of a conviction under the Canada Temperance Act. This agrees with the decision in all the provinces.

We should note, also, that in *Ward v. Reid (y)*, it was held by the Supreme Court of New Brunswick, that the Dominion Act, 32 & 33 Vic. c. 31, s. 78, which provided that penalties against justices of the peace for the non-return of convictions, may be recovered in an action of debt by any person suing for the same in any court of record, was within the competence of the Dominion parliament, and that a provincial enactment declaring that county courts should not have jurisdiction in such cases, was thereby overborne. It is submitted that the Dominion Act can only be held to apply to convictions for offences under Dominion legislation, and can have no application to convictions for offences against provincial laws.

Although we defer consideration of the excepted matter of the constitution of courts of criminal jurisdiction, we should here make reference to some cases in which question has arisen as to the nature of the legislation impugned, whether relative to the "constitution" of the court or to procedure.

In *Regina v. Bradshaw (z)*, it was held that trial with or without jury is a question of procedure, and is not

(x) 21 N. S. R. 216.

(y) 22 N. B. Rep. 279 ; 3 Cart. 405.

(z) 38 U. C. Q. B. 564.

a matter relating to the "organization" of courts. The validity of Dominion legislation adopting, for purposes of criminal trials, provincial law in reference to the selection of jurors was upheld in *Reg. v. O'Rourke (a)*, a case sufficiently referred to in *Reg. v. Plante*, about to be noted.

In reference to the provision in the Dominion Criminal Procedure Act (see R. S. C., c. 174, s. 160), adopting the provincial jury law, this saving clause is inserted: "subject always to any provision in any Act of the parliament of Canada, and in so far as such laws are not inconsistent with any such Act." Section 166 of the same statute makes provision for a mixed jury, when duly demanded in the province of Quebec, and section 167 makes a somewhat similar provision for the province of Manitoba. In the latter province, prior to 1890, the jury laws were adapted and conformed to the requirements of the Criminal Procedure Act. There were provisions for the selecting, summoning and impanelling of French-speaking jurors in case a mixed jury was required, but in 1890 these provisions were repealed. In *Queen v. Plante (b)*, the defendant demanded a mixed jury, or a jury composed of at least six persons skilled in the language of the defence, as prescribed for in section 167 of the Criminal Procedure Act, but such a jury could not be obtained. Upon a case reserved, the majority of the court gave judgment, quashing the case, upon the ground that, as judgment had been given on demurrer at the trial upon the point raised, it had become matter of record and could not therefore be reserved, a writ of error being the only remedy. Mr. Justice Dubuc dissented from this view, and therefore found it necessary to consider the constitutional question involved. After referring to *Regina v. O'Rourke* and the views of Wilson, C.J., and Hagarty, C.J., therein expressed, his judgment proceeds:

(a) 1 O. R. 465; 32 U. C. C. P. 388; see note (h) *ante*, p. 202.

(b) 7 Man. L. R. 537.

“I perfectly agree with those views. I think that the jury, when empanelled and sworn, became part of the constitution of the court; but, at the same time, I am of opinion that the selecting and summoning of jurors are matters of criminal procedure over which the Dominion parliament has exclusive jurisdiction. It being so, section 169 of the Criminal Procedure Act, by which the power to select and summon jurors is delegated to the province, must be held to be *intra vires*. As, therefore, the provinces exercise the power of selecting and summoning jurors only by delegation of the Dominion parliament, and as, by section 160, the delegation is made ‘subject always to any provision in any Act of the parliament of Canada, and in so far as such laws are not inconsistent with any such Act,’ it follows that section 167 of the Criminal Procedure Act, by which, in Manitoba, that power, delegated to the province, of selecting and summoning jurors is qualified in providing for a mixed jury when duly demanded, is also *intra vires*.

“The authority to delegate implies the authority to qualify and restrict the power delegated. By section 160, in delegating to the provinces the power of selecting and summoning jurors, the parliament of Canada reserved to itself the right to make provisions in regard to the same. . . . The parliament of Canada, by said section 167, has prescribed and determined what kind of jury shall, in certain cases, be required for criminal assize. It follows that any jury summoned to serve at a criminal assize, and different in its composition from the jury required by the provisions of section 167, may be, by any prisoner entitled to the benefit of such provisions, challenged as not properly and duly summoned” (c).

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

(c) See also Reg. v. Foley, 2 Cart. 653 (n).

Referring to the various sub-sections of section 92, the only express exceptions are those mentioned in sub-sections 1 and 10. With reference to the latter we need say nothing here, as the notes to that sub-section discuss the matter with sufficient fullness. As to the former, it is submitted that this sub-section 29 does not apply to warrant the Dominion parliament in amending the provincial constitutions "as regards the office of Lieutenant-Governor." Any such legislation would be repugnant to the spirit, if not the express terms, of the B. N. A. Act. The office of the Lieutenant-Governor is, as we have frequently remarked, a link in the chain of connection between the provinces and the Empire, and the whole spirit of the B. N. A. Act is that this is one of those fundamental matters in connection with the scheme of Canadian political organization, which is matter of Imperial concern. This is recognized in that passage of the judgment of the Privy Council in *Liquidators of Maritime Bank v. Receiver-General of New Brunswick (d)*, in which their Lordships say that the Dominion government is, in relation to a Lieutenant-Governor, "a governing body, who have no powers and no functions except as representatives of the Crown."

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

As to the wide effect given to this concluding clause in the earlier decisions in our courts, see chapter X, *ante*, p. 207. Its reference to sub-section 16 of section 92 is now clearly settled by authority. In *L'Union St. Jacques v.*

(d) Times L. R. Vol. VIII. 677; see *ante*, p. 307.



Bélisle (*e*), Lord Selborne lays it down that the onus is on the party who contends that any matter, "being of a private nature," does also come within the class of subjects specially enumerated in the 91st section. Note, too, the way in which the reporter quotes this clause, putting "matters of a local or private nature" in inverted commas as a quotation from section 92, sub-section 16. See also *Dow v. Black* (*f*), and *Citizens v. Parsons* (*g*) where the grammatical connection with sub-section 16 of section 92 is clearly pointed out. In note (xi) to section 91, *ante*, p. 352, we have pointed out the bearing of this clause on the question as to the power of the Dominion parliament to pass "private Acts," and the notes to sub-section 16 of section 92 contain further reference to it.

### *Exclusive Powers of Provincial Legislatures.*

Subjects of  
exclusive Pro-  
vincial Legis-  
lation.

**92.** In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say :—

As to the powers, other than legislative, and the privileges and immunities of provincial legislatures, see the notes to section 69, *ante*, p. 326. The notes to the opening clause of section 91 should be read preparatory to the consideration of the various sub-sections of this section 92.

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.

(*e*) L. R. 6 P. C. 31.

(*f*) L. R. 6 P. C. 272, at p. 282.

(*g*) 7 App. Cas. 96, at p. 108.

When, in the early 'fifties, it was considered desirable to make the Legislative Council of (Old) Canada elective, it was thought that nothing short of Imperial legislation could effect the change; that any colonial legislation to that end would be "repugnant" to the provisions of the Union Act, 1840, which prescribed the form of political organization in the province. Accordingly, an Imperial Act (17 & 18 Vic. c. 118) was passed (*h*) authorizing the parliament of Canada to make the desired change. The Act authorized further alteration, from time to time, but with the proviso that any Bill for such purpose should be reserved for the signification of Her Majesty's pleasure thereon; and it also repealed certain clauses of the Union Act limiting the power of the Canadian parliament in the matter of making alteration in the membership of the Legislative Assembly of the Province.

When, in the early 'sixties, the legislature of South Australia desired to alter the constitution of the Legislative Council and House of Assembly of that colony, Imperial intervention was not sought. Doubts were, in consequence, raised as to the validity of the colonial Acts by which the desired change had been enacted, and, to set at rest these doubts, 26 & 27 Vic. c. 84 (Imp.) was passed, by which it was enacted:

"All laws heretofore passed or purporting to have been passed by any colonial legislature with the object of declaring or altering the constitution of such legislature, or of any branch thereof, or the mode of appointing or electing the members of the same, shall have, and be deemed to have had, from the date at which the same shall have received the assent of Her Majesty, or of the Governor of the colony on behalf of Her Majesty, the same force and effect for all purposes whatever as if the said legislature had possessed full powers of enacting laws for the objects aforesaid, and as if all formalities and conditions by Act of parliament or otherwise prescribed in respect of the passing of such laws had been duly observed."

(*h*) See it printed in full in Houston's "Const. Doc. of Can." at p. 177.

but this Act though applicable to all the colonies of the Empire was retrospective, merely, in its operation.

In the next year, however, was passed the Colonial Laws Validity Act, 1865, to many of the provisions of which we have already referred. The Act is one of such importance, that, although we have quoted nearly every section of it in various parts of this book, we have given it a place in the appendix, in order that it may be studied in its entirety. Upon our present subject, the important clause is the 5th, enacting that—

“—Every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting *the constitution, powers, and procedure* of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of parliament, letters patent, order in council, or colonial law for the time being in force in the colony.”

Such was the position of affairs at the time the B. N. A. Act, 1867, was passed. What is the effect of this later Imperial Act, in respect of the applicability, to the legislative bodies now existing, under it, in Canada, of this clause of the Colonial Laws Validity Act, 1865? We have already discussed this question, to a slight extent, in reference to the power of the Dominion parliament—see *ante*, p. 280—and have pointed out that under the words “to make laws respecting the constitution” no power is conferred by the clause upon any colonial legislative body to enlarge the sphere of its legislative authority. *A fortiori*, the fact that by the B. N. A. Act, the field for the exercise, in Canada, of colonial legislative power is exhaustively divided, into divisions exclusive each of the other, clearly prevents any such enlargement, by any one of our legislatures, of the sphere of its authority. The word “constitution,” therefore, must be limited to the defining how, within its allotted sphere, the work of government, legislative and executive, is to be carried on—what is to be the machinery of government.

Of "powers" and "procedure" we have already said (*i*) that, as to the Dominion parliament and provincial legislatures, this clause of the Colonial Laws Validity Act, 1865, is still in force to enable them (save where, as by section 18, the B. N. A. Act expressly limits its force) to define their powers, other than legislative, and to regulate their procedure.

It has at length been authoritatively enunciated by the highest tribunal in the Empire that the form of political organization in Canada is truly federal; that the B. N. A. Act had for its object "neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, intrusted with the exclusive administration of affairs in which they had a common interest, each province *retaining* its independence and autonomy." The word "federal" can have significance only as between the parties to the federal union, and in no way can it have any bearing upon our relations to the government of the United Kingdom, although the agreement entered into by the provinces required, for its legal validity, to be clothed in the garb of an Imperial Act. While, however, the "constitution" of the federal government was thus matter of agreement between the provinces, and while the B. N. A. Act confers no general power (*j*) upon the parliament of Canada to make alteration therein, no limitation would have been proper in regard to the "constitutions" of the provincial governments—no restriction upon the manner in which the work of government should be carried on in relation to those matters in respect of which they retained their "independence and autonomy"—other than in regard to the position of the executive head, designed to be the connecting link, binding the provinces, through the Dominion executive, to the home government and the Empire. Apart from this new feature, the provincial "constitutions" were

(*i*) See notes to ss. 35 and 69, *ante*.

(*j*) Special power is given, for obvious reasons, in relation to elections, etc. See s. 40, *et seq.*



to continue as before the Union—employed, of course, upon a small range of matters—and no withdrawal of the powers which had been conferred by the Colonial Laws Validity Act was contemplated. By way of abundant caution, however, it was deemed advisable to enact that “notwithstanding anything in this Act” the provincial legislatures should have still the power to amend the provincial constitutions, save, for the reasons above indicated, “as regards the office of Lieutenant-Governor.”

We have, from time to time, in the notes to the various sections relating to the provinces and their form of government, pointed out alterations and amendments which have been made under the authority of this sub-section. Under it Manitoba has abolished her second chamber, and there are signs of a disposition on the part of some of the other provinces to follow suit to this lead on the part of our youngest province. There is no limit, however, to the extent to which the “amendment” may proceed, save in so far as it may be restrained by the exercise of the power of disallowance. No particular form of *provincial* government is “guaranteed” by our charter of government—beyond this, that its executive head must be the Queen, represented in each province by a Lieutenant-Governor, appointed by the federal executive, and through this representative she is entitled to share in all provincial legislation.

An Act of the Ontario legislature conferring upon the Lieutenant-Governor power to remit, by order in council, any fine or penalty, to which any person might have become liable through breach of any provincial law, was held (*k*) not to offend against the exception—not being an amendment of the constitution “as regards the office of Lieutenant-Governor.

## 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.

(*k*) *Atty.-Genl. for Canada v. Atty.-Genl. (Ont.)*, 20 C. R. 222; 19 O. A. R. 31. See notes to s. 53, *ante*, p. 305.

### 3. The borrowing of money on the sole credit of the Province.

As to the other source of provincial revenue, see sub-sections 5, 9 and 15 of this section 92, and section 102 *et seq.*, and notes thereto. See also notes to sub-sections 3 and 4 of section 91, *ante*, p. 376.

The operation of the power conveyed by sub-section 2 is limited—"in order to the raising of a revenue for provincial purposes"—but, in *Dow v. Black* (l), it was held that this sub-section authorizes the imposition of "direct taxation for a local purpose upon a particular locality within the province," and is not to be limited to direct taxation, "only for the purpose of raising revenue for general provincial purposes, that is, taxation incident on the whole province for the general purposes of the whole province." In that case the tax necessary to pay a local *bonus* was directly imposed by the Act impugned, but, bearing in mind the principle of *Hodge v. The Queen*, as to the delegation of power (see *ante*, p. 202), the decision in *Dow v. Black* is sufficient warrant for the whole system of municipal taxation now operative throughout Canada. Had the construction contended for prevailed, the taxing powers of a municipality would have been cut down to license fees under sub-section 9; and direct subsidies from the provincial governments must have been resorted to (m), if indeed that method could have been upheld as being for the general benefit and purposes of the whole province.

What is direct taxation? This question has been under consideration by the Judicial Committee of the Privy Council in several cases, the last being *Bank of Toronto v. Lambe* (n), in which it was held that a tax imposed upon

(l) L. R. 6 P. C. 272.

(m) See, however, *Lynch v. Canada N. W. Land Co.*, 19 S. C. R. 204, in which Chief Justice Ritchie speaks of the power of taxation as being essential to "municipal institutions." See the notes to s. 92, s.-s. 8, *post*.

(n) 12 App. Cas. 575.

banks which carry on business within the province, varying in amount with the paid-up capital, and with the number of its offices, is direct taxation.

“First, is the tax a direct tax? For the argument of this question, the opinions of a great many writers on political economy have been cited. . . . But it must not be forgotten that the question is a legal one, namely, what the words mean as used in this statute; whereas the economists are always seeking to trace the effects of taxation throughout the community, and are apt to use the words ‘direct’ and ‘indirect’ according as they find the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the tax-payers or by private bargains about its payment. Doubtless such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist’s definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

“After some consideration, Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. The definition is as follows:

“‘Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. Such are the excise or customs. The producer or importer of a commod-

ity is called upon to pay a tax on it, not with the intention to levy a contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed he will recover the amount by means of an advance in price.'

"It is said that Mill adds a term, that, to be strictly direct, a tax must be general, and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point, nor would they presume to say whether, for economical purposes, such a condition is sound or unsound, but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

"Their Lordships, then, take Mill's definition, above quoted, as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellants' counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious *indicia* of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

"Now, whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec Legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs' duty, which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid and intended to be paid by the



foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank, apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one. The amount of recoupment cannot bear any direct relation to the amount of tax paid, and, if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec government. For these reasons, their Lordships hold the tax to be 'direct taxation.' "

With this description of direct taxation may be compared that given by the same Committee in *Attorney-General (Quebec) v. Reed* (o), where Mill's definition was also relied on in support of the holding that a stamp duty on "exhibits," filed in the course of judicial proceedings, is not "direct" taxation, and that the Act imposing such a duty was therefore *ultra vires* of the Quebec legislature:

"Can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character, the person who pays it may be a trustee, an

administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character, the person who pays it is a litigant, expecting or hoping for success in the suit, and whether he or his adversary will have to pay it in the end must depend on the ultimate termination of the controversy between them. The legislature in imposing the tax cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else. Therefore it cannot be a tax demanded 'from the very persons who it is intended or desired should pay it'; for, in truth, that is a matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the second section of the ninety-second clause of the Act in question."

The legislature of Quebec passed, in 1875, an Act (39 Vic. c. 7) providing for the issue of licenses to insurance companies doing business in the province. Nothing was to be paid on the issue of the license, but, on the issue of any policy by an insurance company, stamps were to be affixed to an amount varying with the amount of the premium. This was held by the Judicial Committee of the Privy

Council in *Attorney-General v. The Queen Insurance Company (p)*, to be not a license, but a stamp duty on policies. In the latter view it was held to be indirect taxation. In arriving at the meaning to be attributed to the words "direct taxation" the Committee point out that they may have a technical (economical or legal) or popular meaning. No attempt is made to decide this question, because it was held that, by whichever key interpreted, a stamp duty, such as was imposed by the Act, was not direct taxation. ✓

The decision of the Supreme Court of Canada, in *Severn v. The Queen (q)*, must upon this point be considered overruled. It was held in that case that a license fee required to be paid by brewers, under an Act of the legislative assembly of Ontario, was indirect taxation; applying, however, the considerations dwelt upon by the Privy Council, particularly in *Bank of Toronto v. Lambe (r)*, such a license fee must be held to be direct taxation. It is intended to be paid by the very person on whom it is imposed, and if that person manages to recoup himself, it must be by some circuitous method, the amount of recoupment on each sale of beer bearing no relation whatever to the tax imposed. Even before *Bank of Toronto v. Lambe* was decided the Judges of the Supreme Court seem to have recognized that the authority of *Severn v. The Queen* had been seriously impugned. See, however, the observations of Gwynne, J., in *Molson v. Lambe (s)*; but, so far as appears from the report of this case, *Bank of Toronto v. Lambe* was not referred to. The holding, too, of the Supreme Court that such a license fee upon brewers was a "regulation of trade and commerce" cannot be supported, for reasons also set out in *Bank of Toronto v. Lambe*, as well as in earlier cases to which reference has already been made in the notes to sub-section 2 of section 91.

(p) 3 App. Cas. 1090.

(q) 2 S. C. R. 70.

(r) 12 App. Cas. 575.

(s) 15 S. C. R. at pp. 288-9.

In *Longueuil Navigation Co. v. Montreal* (*t*), an Act of the Quebec legislature authorizing the city of Montreal to impose an annual tax on ferrymen and ferry companies, was held to be *intra vires*. See notes to section 91, sub-section 10, *ante*, p. 383.

Referring to the other sources of provincial revenue, and to the various institutions which a province has to maintain, the question arises, are the powers of provincial legislatures under those sub-sections limited to "direct" taxation? In *Attorney-General (Quebec) v. Reed* (*u*), above referred to, the Judicial Committee of the Privy Council declined to determine "whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable." The point was considered by Mr. Justice Gwynne in the same case when before the Supreme Court of Canada (*v*). The contention was, that under sub-section 15 of section 92, "the constitution, maintenance and organization of provincial courts" indirect taxation might be resorted to, and that, therefore, a stamp duty on "exhibits" might be imposed under the authority of a provincial Act.

Mr. Justice Gwynne says:

"The express provision made by item 2, which, while it authorizes the legislatures to make laws in order to the raising of a revenue for provincial purposes by taxation, limits the exercise of the authority thus conferred to direct taxation, very clearly excludes, in my judgment, the power of raising a revenue by any species of taxation other than by direct. . . . That the maintenance of provincial courts and the administration of justice are provincial purposes, there can be no doubt. They are therefore comprehended within the purview of item 2 of section 92, which in express terms prescribes direct taxation as the mode

(*t*) 15 S. C. R. 566.

(*u*) 10 App. Cas. 141.

(*v*) 8 S. C. R. 408; at p. 431.



of taxation to be adopted for raising revenue for provincial purposes, so that upon the principle of *expressum facit cessare tacitum*, there can be no such implied power involved in this item 14, as is insisted upon; moreover, if the contention were sound, then upon the same principle they could equally pass an Act imposing a special tax of an indirect character for the payment of provincial officers under a power implied under item 4 of this 92nd section, and another Act imposing another special tax, also of an indirect character, to defray the expense attending the establishment, maintenance, and management of public and reformatory prisons, under the powers conferred by item 6, and another to defray the expense attending the establishment, maintenance, and management of hospitals, asylums, etc., under the powers conferred by item 7; . . . and so the effect would be that this implied power of raising revenue by indirect taxation, which, it is contended, the legislatures have, being exercised, as it might be if they have the power, to raise sufficient revenue to defray all the expenses of the government and legislatures in respect of all the several matters under their control and jurisdiction, it would be quite unnecessary for them to exercise the power conferred by item 2, raising by direct taxation the revenue for provincial purposes, or to draw upon the revenue created by the subsidy paid by the Dominion, or by sale of the public property, or other income arising therefrom, or from the assets assigned to each province. Such a contention appears to me to involve so palpable a *reductio ad absurdum*, as to carry with it its own refutation; and indeed the judgment of the Privy Council in *Attorney-General (Quebec) v. The Queen Insurance Company*, in effect, decides that the provincial legislatures cannot, by any Act of theirs, authorize the raising a revenue by any mode of taxation other than direct."

That the Privy Council did not consider the question determined by any previous decision of their own is apparent from the language of the judgment of that tribunal when the case came before them. The question is touched upon in other Canadian authorities—for example, in *Regina v. Taylor (w)*, where Mr. Justice Wilson—afterwards Chief Justice Sir Adam Wilson—says:

“The power which is vested in Ontario to raise money by direct taxation excludes, of course, as a general rule, the right to raise it by indirect taxation. But, by means of the powers, numbers 8 and 9, relating to licenses and to municipal institutions, it is plain that Ontario may, and does, by virtue of these powers, raise very large sums of money by indirect taxation. Power No. 2 must be read as qualified in its absoluteness, therefore, by powers No. 8 and 9.”

In *Leprohon v. Ottawa* (x), the late Chancellor Spragge expressed the opinion that a provincial legislature cannot confer upon a municipality of its own creation power to do what it cannot itself do; and if this be sound law, the powers of municipal corporations in the matter of taxation must be limited to direct taxation, if the powers of the province are so limited.

As to the powers under sub-section 9 of section 92, it may be said that the judgment of the Privy Council in *Bank of Toronto v. Lambe* establishes that license fees are “direct” taxation; so that the controversy would appear to be limited to those sub-sections of section 92 (y), which give provincial legislatures power to provide for the *maintenance* of certain institutions, and as to these it is submitted, the same limitations exist. The raising of money to maintain these institutions—courts, prisons, hospitals, etc.—would be for “provincial purposes,” as interpreted in *Dow v. Black* (z).

Following *Atty.-Genl. v. Reed*, the Court of Queen’s Bench in Manitoba held in *Plummer Wagon Co. v. Wilson* (a), that the then existing provincial statutes requiring payment of fees by means of law stamps on proceedings in that court were *ultra vires*. Thereupon, acting upon the distinction suggested by the Committee, the Manitoba legis-

(x) 2 O. A. R. 522; at p. 526.

(y) s-ss. 6, 7 and 14.

(z) L. R. 6 P. C. 272; see *ante*, p. 425.

(a) 3 Man. L. R. 68.

lature passed an Act creating a special fund "solely for the maintenance of the administration of justice in the courts of this province," to which fund the fees payable in stamps upon legal proceedings were appropriated. This Act was impugned, and in *Dulmage v. Douglas* (*b*), was upheld by Mr. Justice Dubuc, but, on appeal to the full court, this decision was reversed and the statute pronounced *ultra vires*. In the opinion of the court, the only exception to the limitation laid down in this sub-section 2 is that expressed in sub-section 9, but as the judgment of the Privy Council in *Bank of Toronto v. Lambe* (*c*), in effect holds that license fees are "direct taxation," no doubt the Manitoba Court would agree with the view we have ventured to express, that there is no exception to the rule laid down in this sub-section 2. The Manitoba legislature surmounted the difficulty by 49 Vic. c. 51, declaring law stamps to be a direct tax, and making good this declaration by enacting that such fees, so payable in stamps, are not to form any part of the costs of an action taxable between party and party, but are, in fact, to be borne once for all by the party actually paying them in the first instance. This Act was declared *intra vires* by the full court in *Crawford v. Duffield* (*d*).

We have already referred to that part of the judgment in *Bank of Toronto v. Lambe* which lays it down that the powers of taxation vested in the provincial legislatures by this sub-section are not to be curtailed, because possibly they may be abused or so exercised as to prejudicially affect corporations and institutions existing under Dominion laws (*e*). See also notes to section 91, sub-section 8, for a further reference to the case of *Leprohon v. Ottawa* (*f*), in

(*b*) 3 Man. L. R. 562; 4 *ib.* 495.

(*c*) 12 App. Cas. 575.

(*d*) 5 Man. L. R. 121.

(*e*) See notes to s. 91, s-s. 15.

(*f*) 2 O. A. R. 522; see also the note to the next sub-section.

which it was held that provincial legislatures have no power to tax the salaries of members of the executive staff of the Dominion.

With regard to the meaning of the expression, "within the province," we may again refer to Bank of Toronto v. Lambe, which decides that it is not necessary that the persons to be taxed under a provincial law be domiciled, or even resident, in the province. It was urged in that case that the Bank of Toronto was an Ontario corporation, having its domicile in Toronto, and that the taxation must therefore fall on persons not within the province of Quebec; but to this it was answered:—"Any person found within the province may be legally taxed there. This Bank is found to be carrying on business there, and on that ground alone it is taxed."

4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers.

This sub-section is the guarantee for the continuance of "responsible government." It covers the entire executive department of provincial government—with the sole exception of the Lieutenant-Governor, and of those judges mentioned in section 96 of the B. N. A. Act—and ensures that the people of the province, through the provincial assembly, shall always be able to make the members—high and low—of the provincial executive staff *feel* responsibility. In the third chapter of this book we have endeavored to make clear the intimate connection which exists between "tenure of office" and the power to "withhold supplies," and have there pointed out that the grant to colonial legislatures of the latter power necessarily carried with it that the tenure of office in the colony should be at their "pleasure."

With reference, however, to the existence of dual government in Canada, it has been laid down (g) that the



provincial legislatures cannot impose burdens—*e.g.*, a municipal income tax—upon the “instruments” by which the Dominion government is carried on. Whether this judgment can stand in the face of *Bank of Toronto v. Lambe* (*h*) is, perhaps, questionable. The impossibility of applying the principle, conversely, to relieve provincial officers from the burden of federal tariffs rather tends to weaken the *ab inconvenienti* argument.

It has been held that a provincial legislature is within its powers in appointing officers entrusted with the enforcement of The Canada Temperance Acts of 1864 (*i*) and 1878 (*j*) in municipalities where either of them had been adopted. In the last case the ground for the decision is thus put by the present Chancellor of Ontario:

“The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the province within the meaning of the B. N. A. Act, section 92, item 16. The enforcement of the Act in the adopting municipalities involves questions of local police regulation. For the purpose of ensuring uniformity and efficiency of action, the prosecution of offenders may be properly relegated to the hands of provincial officers, for the appointment and payment and governance of whom laws may be made under the B. N. A. Act, section 92, item 4. The expense of carrying the Act into effect within the adopting county is a burden to be borne by the ratepayers of that locality. So that the legislation now questioned may also fall within the scope of the B. N. A. Act, section 92, item 8, as pertaining to municipal institutions within the province.”

With much misgiving, we venture to question the correctness of these decisions. The “local option” character

(*h*) 12 App. Cas. 575.

(*i*) *License Commissioners v. Prince Edward*, 26 Gr. 452—*per* Spragge, C., (1879).

(*j*) *License Commissioners v. Frontenac*, 14 O. R. 741—*per* Boyd, C., (1887).

of the Canada Temperance Act—its localization by municipal suffrages—was much pressed in argument in *Russell v. The Queen*, as shewing the subject matter of that Act to be within the legislative competence of a provincial legislature only. The argument was rejected by the Privy Council, and it appears to us that, so long as that decision stands, the enactment of laws for the enforcement of the provisions of that Act cannot be said to be a matter of a merely local or private nature in the province. Laws “in relation to” any subject matter must come in their entirety from that legislature to which the subject matter is committed. It is the question over again of the necessary connection between legislature and executive. It is, of course, open to the Dominion parliament to utilize existing provincial machinery (*k*), or to confer upon “boards” or bodies of provincial creation powers and authorities in relation to the enforcement of Dominion laws, but, *quoad* the duties imposed by Dominion legislation, the members of the municipal bodies or “boards” are not *provincial* officers. The above cases, however, did not involve consideration of the power of the Dominion legislature to delegate its authority or to adopt existing institutions, but of the power of a provincial legislature to supplement Dominion legislation upon a matter admittedly within the exclusive ken of the latter, by the appointment of an executive staff to carry it out.

##### 5. The Management and Sale of the Public Lands belonging to the Province and of the timber and wood thereon.

“It must always be kept in view that, wherever public land with its incidents is described as ‘the property of’ or as ‘belonging to’ the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has

(*k*) See *ante*, p. 417, as to their adoption of provincial laws as to jurors; and *ante*, p. 232, as to the trial of (Dominion) election petitions by provincial courts.

been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.—*Per Lord Watson in St. Catherines Milling Co. v. The Queen (l).*

The case from which the above extract is quoted is a decision that the “lands reserved for the Indians” mentioned in sub-section 24 of section 91, become, when disencumbered of the Indian usufructuary interest, “public lands belonging to the province,” or, perhaps we should say, that they are always such, subject to the encumbrance of that Indian interest.

The matter, however, of public assets, revenue producing and otherwise, will be fully considered in the notes to the group of clauses of this Act, which deal more fully therewith—102, *et seq.*

As to the position of Manitoba and the North-West Territories in reference to the public lands within those areas we shall have to speak in Part IV. of this book.

6. The Establishment, Maintenance  
(i) and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance  
and Management of Hospitals, Asylums,  
Charities and Eleemosynary Institutions  
in and for the Province, other than Marine  
Hospitals.

(i) “*Maintenance.*”—See note to sub-section 2 of section 92, where reference is made to the query—suggested by the Privy Council in *Attorney-General of Quebec v. Reed (m)*—as to the power of a province to maintain prisons, hospitals, etc., and courts by “indirect taxation.”

## §. Municipal Institutions in the Province.

It must be admitted that the authorities are in a very unsatisfactory state as to the precise scope of this subsection, and as to the powers intended to be thereby conferred upon provincial legislatures. The main question is one that goes to the very root, and it has been brought prominently into discussion in connection with that most prolific cause of litigation—the traffic in intoxicating liquor. In one of the earliest cases (*n*) which arose in Ontario in reference to the power of a provincial legislature to authorize municipal bodies to restrict the traffic, the late Chief Justice Richards intimated his opinion that the Imperial parliament, in passing the B. N. A. Act, “on the suggestion of, and on conference with the delegates from the various provinces” must have intended to empower those provinces to establish municipalities which “would possess the same powers as those which were then in existence, under the same name, in the province”—*i.e.*, in that part of (old) Canada, formerly known as Upper Canada, and now forming the province of Ontario. To the like effect, the court of final resort in Quebec held (*o*), in 1883, that the state of things existing in the provinces at the time of Confederation, and more particularly that which was recognized by law in all or most of the provinces, is a useful guide in the interpretation of the meaning attached by the Imperial parliament to indefinite expressions employed in the B. N. A. Act. At the time of Confederation, the right to prohibit the sale of intoxicating liquors was possessed by municipal authorities under the laws in force respecting municipal institutions in both parts of the province of Canada, and in Nova Scotia; and the court held that in consequence it should be deemed to be included within the term “municipal institutions” in

(*n*) Slavin v. Orillia, 36 U. C. Q. B. 159; see *ante*, p. 359.

(*o*) Sulte v. Three Rivers, 5 Leg. News, 330; 2 Cart. 280; see *ante*, p. 362.



this sub-section. In the opinion of the Court, the provincial legislatures have the power for the purposes of "municipal institutions" to pass a prohibitory liquor law, applicable to all municipalities within the province. In delivering the judgment of the court Mr. Justice Ramsay thus deals with the question of the meaning to be given to the term "municipal institutions":

"It may be at once conceded that the power to pass prohibitory liquor laws is not essential to the existence of municipal institutions, and that consequently in a very restricted reading of sub-section 8, it would not justify the local legislature in passing a prohibitory liquor law. But, it may fairly be asked, whether it was the intention of the Imperial parliament in an enumeration of this sort to confine 'municipal institutions' to those matters only which are of the essence of municipal institutions? If such was the intention of parliament, a wide field for speculation was left open, or it was contemplated to restrict municipal institutions within very narrow limits. It would seem, however, we have not to determine what institutions are essential to municipal existence in the abstract, but the meaning of the term at the time of Confederation."

Reference is made in the judgment to the fact that in New Brunswick, prior to Confederation, no statute conferred any such powers upon municipal corporations, but their existence in "the two great provinces of Confederation and one of the small ones" was, in the opinion of the court, sufficient to include them within the powers intended to be conferred under the expression "municipal institutions" in this sub-section 8.

The Court of Appeal for Ontario has lately had occasion to review the earlier decision of Chief Justice Richards, and, as we have before intimated, it was held (p): that a provincial legislature can empower a municipal body to pass a prohibitory by-law, because, at the date of Confederation, municipalities had that power in Upper

(p) *Re Local Option Act*, 18 O. A. R. 572; see *per* Maclellan, J.A., at p. 596.

Canada, now Ontario, thus confirming the opinion expressed in the earlier case.

In both Ontario and Quebec, therefore, this must be taken as law, that whatever powers municipal bodies had been invested with prior to the Union, those powers can now be conferred upon them *by a provincial legislature*—that the term “municipal institutions” must be taken to cover all such powers.

In the case to which we have last referred, an admission is made to much the same effect as that made by Mr. Justice Ramsay in the Quebec case—“that there is no inherent connection between the liquor traffic and municipal institutions”; but this is qualified by the statement that there is—as to Ontario at least—a constitutional connection, and that, in fact, in all the provinces there was the power to regulate the traffic, in some to even prohibit it, within the bounds of the municipality.

It must not be forgotten, however, that the pre-Confederation provinces had all the powers of colonial self-government; their legislatures could make laws in relation to all matters not of Imperial concern, or governed by Imperial legislation; there was then no sub-division of the field between co-ordinate legislative bodies within the colony, and upon the principle of *The Queen v. Burah*, and subsequent cases (*q*), these pre-Confederation legislatures could, from time to time, invest municipal bodies with such of their own powers as to them seemed fit.

The late Mr. Justice Dunkin adverts to this in *Cooey v. Brome* (*r*) in the following terms :

“Nor is there wanting a sense of the words ‘municipal institutions in the province’ which would extend them also over ground assigned exclusively to parliament, and notably would limit its trade and commerce powers. Under legislation not federally limited in that behalf, all sorts of powers are of course

(*q*) See *ante*, p. 177, *et seq.*

(*r*) 21 L. C. Jur. 182, 2 Cart. 385; see *ante*, p. 361.

more or less delegated to municipal bodies whenever convenience may seem so to require. But for a legislature of strictly limited jurisdiction, nothing is clearer than that it can delegate no powers beyond those it can directly exercise. Our legislature can delegate no power of regulation of trade and commerce, nor over fisheries, nor weights and measures, nor anything else matter of merely parliamentary legislation. Each provincial legislature alone can create municipalities properly so-called; establish their functionaries, and assign them their proper duties and their powers—but always within the limits of its own. Whether or not it can render them incapable of other duties and powers, to be delegated by parliament, is a question that need not here be considered. Our legislature, as will presently be seen, has been careful to declare them not so. And as to all powers not of provincial competency, so to speak, which they may hold under antecedent delegation of the unlimited legislature of the late province of Canada, these can be resumed or altered by parliament alone. As being exercised by municipalities, they may be styled in a certain sense municipal. But such sense is not that of the Union Act; nor even as mere matter of presumption, *prima facie*, is it that of provincial legislation under authority of the Union Act.”

and the same view is very clearly put by Mr. Justice Burton in *Re Local Option Act* (s):

“It does not suggest itself to my mind as at all conclusive in favor of the power of the Local Legislature to deal with the subject of prohibition under the words ‘municipal institutions’ that provisions in reference to that subject were, at the time of the passing of the Confederation Act, to be found in our own municipal Acts, and had been so for many years. It must not be forgotten that the legislature of the old province of Canada, which passed those Acts, had plenary powers of legislation, . . . in fact, all the powers which are now distributed between the parliament of the Dominion and the legislatures of the provinces. Having that power, it was clearly competent to the legislature to confide to a municipal council or any other

(s) 18 O. A. R. at p. 585. See also *per* Spragge, C. in *Leprohon v. Ottawa*, 2 O. A. R., 522, *ante*, p. 380.



body of its own creation, or to individuals of its selection, authority to make by-laws or resolutions as to subjects specified in the enactment with the object of carrying it into effect"; but, nevertheless, by reason of the constitutional connection above referred to, he gave the term "municipal institutions" the wide scope we have mentioned.

As indicated in the above cases in Ontario and Quebec, the municipal institutions in the various pre-Confederation provinces were widely dissimilar (*t*), ranging from the (for those days) very complete system of Upper Canada to the very incomplete and primitive methods of local government in vogue in New Brunswick. In fact, the maritime provinces can hardly be said to have had any system of municipal government, and the systems of Upper and Lower Canada were by no means identical. Now, admitting, for the sake of the argument, that the term "municipal institutions" is to be construed according to the meaning attached to it in the minds, not of those *by* whom but of those *for* whom it was passed, it is not conceivable that this Imperial Act is to receive a construction geographically variable (*u*). The decisions above noted, therefore, put the Imperial parliament in the peculiar position of having used, as to all the provinces, a phrase which, at the date of Confederation, had a different meaning in the different provinces, intending, without expressly saying so, that the phrase should bear the meaning attached to it in one particular province, *without indicating which*.

It seems to us that such an interpretation must be put upon this sub-section as will obviate these difficulties. "Municipal institutions" is but another form of expression

(*t*) See *Slavin v. Orillia* (Ontario), *Sulte v. Three Rivers* (Quebec), *Keeffe v. McLennan* (Nova Scotia), and *Reg. v. Justices of Kings* (New Brunswick).

(*u*) "The Act placed the constitutions of all the provinces on the same level, and what was true with respect to the legislature of Ontario had equal application to the legislature of New Brunswick."—*Per* Lord Watson, in *Liquidators v. Receiver-General*, *Times L.R.* Vol. VIII., p. 677.



for local self-government by boards or corporate bodies, entrusted with powers of administration and, to some extent, of legislation—but *delegated* powers merely. Irrespective of detail this was a familiar phase of political organization. The essentials of a municipality would appear to be, first, territorial limitation; and, secondly, the organization therein of the executive and legislative machinery and staff for the administration of local affairs. Under a “unitarian” form of government power all flows from the one source, but under a dual government power over any given subject matter must come from, and the mode of its exercise be regulated by, that legislature which has itself power over the particular subject matter. Given the municipalities “instituted” under provincial legislation, the Dominion parliament as well as the provincial legislatures can confer on such municipalities powers of local self-government, each in relation to matters within its own competence (*v*). The vast majorities of the powers exercisable by municipal bodies throughout Canada are conferred by the provincial legislatures, because nearly all those matters which touch the daily life of a man, and regulate his rights and duties as a citizen of a municipality, are comprehended within some one or other of the various sub-sections of section 92. Very few, if any, of the cases which have arisen under the B. N. A. Act, touching the powers of municipal bodies, depend upon a wider scope being given to this sub-section 8, than we have given it. Sub-sections 2, 7, 9, 10, 13, 14, 15 and 16 of section 92, suffice to sustain the exercise of municipal powers in all cases in which it has been questioned (*w*); but that a provincial legislature cannot delegate to a municipal or other body created by it, power over any subject matter not, by the B. N. A. Act allotted to such provincial legislature, is a view which seems to be forced

(*v*) The Canada Temperance Act is an example of power conferred and duties imposed by Dominion legislation.

(*w*) These cases have all been noted under these various sub-sections.

upon us by the exhaustive character of the division effected by that Act, and the exclusive character of the jurisdiction conferred upon our legislative bodies, Dominion and provincial.

Under this sub-section we should, perhaps, note the case of Reg. *ex rel.* McGuire v. Birkett (*x*), in which it has lately been held that a provincial legislature has the exclusive right to designate the judicial officer by whom controverted municipal election cases are to be determined. This is a matter clearly relating to municipal organization, and has no relation to the nature of the powers to be exercised by municipal bodies or officers thereof. We note it here rather than under sub-section 14, because of the expression of opinion by the Privy Council in Valin v. Langlois (*y*) that the trial of election cases does not “quite plainly” come within “the administration of justice in the province.”

9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, local, or municipal purposes.

The scope of this sub-section is limited by the last clause, *in order to the raising*, etc. (*z*), and in Russell v. The Queen (*a*), it was held that the Canada Temperance Act, is not an infringement on the powers of the provincial legislatures under this sub-section:

“The Act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to destroy or diminish revenue; indeed, it was a main objection to the Act, that in the city of Fredericton it did, in point of fact,

(*x*) 21 O. R. 162.

(*y*) 5 App. Cas. at p. 119.

(*z*) See Three Rivers v. Sulte, 5 Leg. News 330, 2 Cart. 280. This does not conflict with the views expressed in earlier cases in Ontario that this sub-section does not exhaust the powers of a provincial legislature in relation to the liquor traffic.

(*a*) 7 App. Cas. 829.

diminish the sources of municipal revenue. It is evident, therefore, that the matter of the Act is not within the class of subjects No. 9, and consequently that it could not have been passed by the provincial legislature by virtue of any authority conferred upon it by that sub-section."

Referring to what we have said in the notes to sub-section 8, it is to be noticed that in *Russell v. The Queen* the effect of sub-section 8 upon the questions there under consideration is not in any way touched upon (b). The previous legislation of New Brunswick on the subject of tavern licenses was looked at merely as the exercise of power under this sub-section 9; and it was held that the mere fact that Dominion legislation upon any matter within its legislative competence might prejudicially affect the revenue derivable from license fees imposed under this sub-section 9, would in no way invalidate such Dominion legislation (c).

In the notes to sub-section 2 of section 92 reference was made to the case of Attorney-General (Quebec) v. The Queen Insurance Co. (d), in which a license tax (so called) imposed upon insurance companies, payable not upon the taking out of the license, but upon the issue of policies, and to an amount depending upon the amount of premium payable upon a policy, was held not to be a license tax at all, but a stamp duty:

"Now, the first point which strikes their Lordships, and will strike every one as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result,

(b) See *Re Local Option Act*, 18 O. A. R. 572.

(c) See *ante*, p. 213, *et seq.*

(d) 3 App. Cas. 1090.

therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "the price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this: that, if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a stamp Act if you leave out these clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the government of the province of Quebec obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt or renewal; it is not a penalty for not taking out the license. The result therefore is this, that it is not in substance a license Act at all. It is nothing more or less than a simple stamp Act on policies with provisions referring to a license, because it must be presumed, the framers of the statute thought it was necessary in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license."

In the notes to sub-section 2 (*ante*, p. 430) will also be found a reference to the cases involving the question whether these license fees are to be considered direct or indirect taxation. See *Pigeon v. The Recorder's Court* (*e*), where the effect of the decision in *Bank of Toronto v. Lambe* (*f*), seems to have been considered to be, in effect, that all these license fees are direct taxation. It is to be

(*e*) 17 S. C. R. 495.

(*f*) 12 App. Cas. 587.



noted, however, that in *Bank of Toronto v. Lambe*, the Committee speak of “direct taxation *and* licenses.” The difference of opinion, therefore, which may very reasonably exist upon the point would be sufficient warrant for the insertion, by the framers of the B. N. A. Act, of this sub-section “by way of abundant caution.”

If the decision in *Severn v. Reg. (g)*, that a brewer’s license cannot be imposed by a province, is still law, it can only be upon the ground that it is “indirect” taxation and not *ejusdem generis* with the licenses particularly mentioned in this sub-section. If it is “direct” taxation, it does not matter whether it is or is not *ejusdem generis*, for *Bank of Toronto v. Lambe* would distinctly uphold it.

10. Local Works and Undertakings,  
other than such as are of the following  
classes,—

- a. Lines of Steam or other Ships,  
Railways, Canals, Telegraphs,  
and other works and under-  
takings connecting the Pro-  
vince with any other or others  
of the Provinces, or extending  
beyond the limits of the Pro-  
vince :
- b. Lines of Steam Ships between the  
Province and any British or  
Foreign Country :
- c. Such works as, although wholly  
situate within the Province, are  
before or after their execution  
declared by the Parliament of  
Canada to be for the general  
advantage of Canada or for the

advantage of two or more of the Provinces.

### 11. The Incorporation of Companies with Provincial objects.

The authorities upon these two sub-sections so run into each other that it will simplify matters if we discuss them together. Their connection is obvious, the "provincial objects" for which incorporation is sought under sub-section 11 being, in probably the majority of cases, "local works and undertakings" falling within sub-section 10. The power lodged by exception (c) in the hands of the Dominion government gives that government the anomalous privilege of defining its own sphere of authority, in reference to these matters, as against the provinces. Much the same power is vested in Congress in reference to "internal improvements," and this has been the subject of much adverse comment from those who view with alarm the encroachment of the central authority. With this phase of the question, however, we should not perhaps concern ourselves in this place, for, at any given moment of time, the line of division is a legal one, though subject to be thereafter shifted at the will of the parliament of Canada.

It has been held by the Court of Queen's Bench of Quebec (*h*) that all works which are wholly within one province, whether the undertaking to which they belong be for a commercial purpose or otherwise, are within the control, and subject to the legislation of the province in which they are situate, unless they are by the parliament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the provinces. The Dominion parliament cannot, it was held, without such declaration, authorize a company to establish in two or

(*h*) Reg. v. Mohr, 7 Q. L. R. 183, 2 Cart. 257.

more provinces, works needing special legislative authority, and which are in their nature local in each province, the jurisdiction in such case to give the needed authority being determined by the location and object of the works, and not by the circumstance that the company is authorized to make them in several provinces.

Applying the law so laid down, the Dominion Act (43 Vic. c. 67), incorporating the Bell Telephone Company, and authorizing the establishment by that company of telephone lines in the several provinces of the Dominion, but which contained no provision as to utilizing their powers for the purpose of connecting two or more provinces, was declared *ultra vires*. Dorion, C.J., says:

“If the Dominion cannot incorporate separate companies for the purpose of establishing separate lines of telegraph in one, or two, or more of the provinces, unless such lines are to connect two or more provinces, or extend beyond the limits of one province, or are expressly declared to be for the advantage of the Dominion, or of two or more provinces, it is because by their nature these separate telegraph lines are local works and undertakings, subject to the exclusive control of the provincial legislatures.

“And if the Dominion cannot authorize separate companies to establish such separate lines of telegraph, whence could it derive its authority to incorporate one company to establish those several works? It is evident that the nature and character of such undertakings cannot be altered from being local undertakings to become general by the mere fact that they are to be established by one company instead of several companies. Their character is determined by their location and object, or by an express declaration of the Dominion parliament, and not by the accident that the same company is authorized to make them all.”

In view, however, of the judgment of the Judicial Committee of the Privy Council, in the case about to be noted (i), *Regina v. Mohr* can no longer be considered a binding

(i) Colonial Bldg. Ass. v. Atty.-Genl. of Quebec, 9 App. Cas. 157.

authority even in Quebec—so far, at least, as it declared the entire invalidity of the Act of incorporation. The larger question as to the subjection of such a company to provincial law—just how far the Dominion parliament can go, beyond merely conferring corporate capacity—is not touched upon in the judgment. It should be pointed out, perhaps, that no doubt was expressed by the court as to the power of the Dominion parliament to authorize the incorporation of a company, with power to establish general telephone communication throughout the various provinces of the Dominion, or between any two of them. The judgment proceeded solely upon the ground that the Act in question gave the company no power to establish such a system, or to make such connection between two provinces. The work which was actually being carried on, under this statute, was held to be a local work falling within sub-section 10, and being such, it could only be authorized by a provincial Act. The judgment of the Privy Council, however, distinctly enunciates that the territorial extensibility of the power, and not the extent to which it is actually exercised, is to decide the question as to which legislature should grant a charter of incorporation.

The power to incorporate companies with powers extending beyond one province, is clearly with the parliament of Canada, and the fact that a company, so incorporated, may not see fit to extend its operations beyond one province, does not affect its status as a duly incorporated company, or render its Act of incorporation (if incorporated by Act of parliament) *ultra vires*. The difference between a Dominion and a provincial company is in the territorial sphere within which the company's powers may be, not within which they are actually, exercised.

In *Clarke v. Union Fire Insurance Co. (j)*, it was held by the Master in Ordinary (Mr. Hodgins, Q.C.), that an in-

(j) 10 P. R. (Ont.) 313. The affirmance of this judgment on appeal does not touch the constitutional point; see 6 O. R. 223.



surance company incorporated under a provincial statute can enter into insurance contracts abroad, *i.e.*, insuring property situated out of the province. *Sed quare*. No doubt it can validly contract in matters collateral to the objects for which it was incorporated, but (apart from the view which might be taken in foreign courts if such contract were sued upon there) it is submitted that, in respect of such insurance contracts, the company must be treated by the courts of these provinces as an unincorporated association of individuals.

In *European and N. A. Railway Company v. Thomas (k)*, a provincial legislature was held by the New Brunswick Supreme Court to be entitled to legislate with respect to a provincial railway running only to the boundaries of the province, such railway being a local work and undertaking within sub-section 10, although, as appeared by the facts of that case, legislation had been procured in the State of Maine incorporating an American company to build a railway in that State to connect with the provincial railway in question.

This sub-section 10 was considered by the Privy Council in *Dow v. Black (l)*, in which a provincial Act authorizing a municipality to grant a bonus to a railway company extending beyond the province, was held to fall within sub-section 2 of section 92, *ante*, or, if not under that sub-section, then under sub-section 16, as to which see *post*. It was held not to be touched by sub-section 10 at all. A question, however, was raised in that case which the Committee abstained from deciding, namely—does exception (a) apply to a railway extending from one province, not into another, but into a foreign country? The limitation of exception (b) to *steamship* lines was urged in support of the view that a provincial legislature has power to enact laws as to *railways* extending from one province into a

(k) 1 Pug. 42, 2 Cart. 439.

(l) L. R. 6 P. C. 272.

foreign country. For reasons which will be found discussed in chapter IX., *ante*, p. 185, *et seq.*, it is submitted that a provincial legislature has no such power, nor indeed has the Dominion parliament, so far as the operation of the road without Canada is concerned. So far as the incorporation of any such company is concerned, sub-section 11 would appear to prevent a provincial legislature from passing any laws in reference thereto. The question of the *status* and rights of a corporation without the limits of the country under whose laws it is incorporated is not within the scope of this work, being a matter of international, rather than of colonial, law.

A number of very interesting cases have arisen involving consideration of the position occupied by federal "works and undertakings" and federal companies in reference to provincial law upon matters within the legislative competence of a provincial legislature—and *vice versa*. In reference to the incorporation of companies with objects other than provincial and other than those covered by the exceptions to sub-section 10, no difficulty perhaps should arise. For the very same reasons which led us to limit the scope of the term "municipal institutions," we submit that a company incorporated under Dominion legislation can exercise no power which its creator could not directly exercise; its Act of incorporation can confer corporate capacity merely and powers in relation to matters within the legislative competence of that creator. We have already touched upon this question (*m*) and shall refer in a moment to certain cases which, we think, bear out the view we have ventured to express. As to works and undertakings falling within the exceptions to sub-section 10—whether carried on by a company or by individuals—a somewhat different question arises, namely—what is covered by the term "works and undertakings"?—but this question must, it seems to us, be ultimately decided upon the very same prin-

(*m*) See *ante*, p. 353.

ciple. The difficulty arises from the fact that a work or undertaking may to-day be provincial and to-morrow federal, and, it may be asked, how can the subject matter of such work or undertaking be—as a matter of law—within the legislative competence of a provincial legislature, one day, and within that of the parliament of Canada the next. Without attempting any elaborate discussion we may venture the opinion that the solution of these questions will require a freer application of the rule laid down in Bank of Toronto v. Lambe—that legislation by one legislature may limit the range open to the other (*n*)—than has yet been attempted. We now proceed to examine the cases.

A railway incorporated under a provincial Act was declared to be a federal railway under clause (c) of sub-section 10, by an Act of the parliament of Canada. An Act of the legislative assembly of Quebec amalgamating the company at its own request with another *provincial* railway, was held *ultra vires* by the Judicial Committee of the Privy Council (*o*).

Mr. Justice Killam in *Manitoba held in Canadian Pacific Ry. v. North Pacific & Man. Ry.* (*p*), that it is within the competence of the Dominion parliament to enact that no provincial railway shall cross a Dominion railway without the approval of the Railway Committee of the Privy Council. He treats the power to legislate in reference to “crossings” as incidental to the power of the Dominion parliament in relation to general undertakings as well as to the power of the local legislatures in relation to local undertakings within this sub-section. It would seem therefore to depend upon the question—which occupied the ground first? Unless this is to be the rule for determining these disputes, it must be conceded that, in this

(*n*) See *ante*, p. 213, and notes to sub-section 16, *post*.

(*o*) *Bourgoin v. M. O. and O. Ry.*, 5 App. Cas. 381.

(*p*) *Man. L. R.*

instance at least, provincial legislation must be subordinate to Dominion legislation.

Where it is necessary for a provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing, must procure the approval of the Minister of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council for the Dominion, and the railway companies concerned cannot waive this provision (*q*).

The power of a provincial legislature to pass laws as to insurance contracts entered into within the province by a Dominion or a foreign corporation, was considered in *Parsons v. Citizens* (*r*), and the view of the Judicial Committee of the Privy Council is thus expressed :

“ It was contended, in the case of the Citizens Insurance Company of Canada, that the company having been originally incorporated by the parliament of the late province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion parliament, could not be affected by an Act of the Ontario legislature. But the latter Act does not assume to interfere with the constitution or *status* of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority, as in the case of the Queen Insurance Company, or by foreign or colonial authority, and without touching their *status*, requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contract shall be subject to certain conditions.”

and this, it was held, a provincial legislature had full power to do, under section 92, sub-section 13.

In *Colonial Building and Investment Association v. Attorney-General of Quebec* (*s*), the Judicial Committee of the Privy Council, referred to the hypothetical case, put by way of illustration in *Citizens v. Parsons*, as to the applica-

(*q*) *Credit Valley R. R. Co. v. Great Western Ry. Co.*, 25 Grant, 507.

(*r*) 7 App. Cas, 96.

(*s*) 9 App. Cas. 157.



bility, to a Dominion company, of a provincial mortmain law, and expressed their continued adherence to the view then entertained as to the respective powers of the Dominion and provincial legislatures in regard to incorporated companies. The two cases lay down very clearly that a Dominion company can only exercise its powers subject to the law of the particular province in which any of its transactions may be carried on. In the first named case the matter was merely put by way of illustration in reference, as we have said, to the operation of provincial mortmain laws:

“Suppose the Dominion parliament were to incorporate a company with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over ‘property and civil rights in the province’) that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed mortmain Acts, though the corporation would still exist and preserve its *status* as a corporate body.”

This the Committee explain in the later case by saying that they had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown’s consent; that their object had merely been to point out that a corporation could only exercise its powers, subject to the law of the province, whatever that may be, in this regard.

In this connection may be mentioned the case of McDiarmid v. Hughes (t), in which the Divisional Court of the Queen’s Bench Division (Armour, C.J., and Street, J.), held that the Dominion parliament has power to enact that a license from the Crown shall not be necessary.

to enable corporations to hold lands within the Dominion; and that a Dominion Act enabling a Quebec corporation to hold lands in Ontario, would operate as a license;—a view difficult to reconcile with the above cases. No doubt, as put by the Chief Justice, an Imperial Act might be passed, extending to all Her Majesty's possessions, providing that thereafter a license from the Crown should not be necessary to enable any corporation to hold lands therein, but it seems to us a *non sequitur* to say that an Act of the Dominion parliament would have effect throughout the Dominion in relation to matters over which, as between the Dominion parliament and the provincial legislatures, the latter have exclusive jurisdiction. The power of a corporation to hold land is part of the law relating to real property, and governed therefore by the *lex loci*, and the grant of a license from the Crown to hold lands, *non obstante* the Mortmain Acts, must be made by the executive head of that government whose legislature has power to pass laws in relation to real property within its territorial limits.

In *Monkhouse v. Grand Trunk R. R.* (u), it was held that a provincial statute which made provision as to "frog-packing" applicable only "to every railway and railway company in respect to which the legislature of Ontario has authority to enact such provisions," did not apply to the Grand Trunk R. R. Company, which falls within exception (a) to this sub-section 10. Just what is the scope of legislation relating to a work or undertaking such as a railway connecting one province with another, is left by this case still uncertain. Mr. Justice Patterson puts his decision on the ground that the statute, there in question, "which relates to the management and in some respects to the construction of railways, and deals only with railways as such" did not apply to the defendant company; and he expressly reserves the question how far

(u) 8 O. A. R. 637.

such an undertaking may be affected by provincial legislation touching property and civil rights or other subjects within the jurisdiction of the provincial legislatures. In *Canada Southern Railway v. Jackson (v)*, before the Supreme Court of Canada, it was held that the Workmen's Compensation for Injuries Act of Ontario (49 Vic. c. 28), applied to the appellant company, notwithstanding that it had been brought under the operation of the Government Railways Act of the Dominion. Mr. Justice Patterson says:

“It is not legislation respecting such local works and undertakings as are excepted from the legislative jurisdiction of the province by article 10 of section 92 of the B. N. A. Act. It touches civil rights in the province. The rule of law which it alters was a rule of common law in no way depending on or arising out of Dominion legislation, and the measure is strictly of the same class as Lord Campbell's Act, which, as adopted by provincial legislation, has been applied without question to all our railways.”

The difference in opinion which is still possible upon this question is made manifest in *McArthur v. N. and P. Junction Ry. Co.* (17 O. A. R. 86) in which the Court of Appeal was evenly divided upon the question of the validity of the clause in the Dominion Railway Act limiting the time within which an action may be brought for injury sustained “by reason of the railway.—R. S. C. c. 109, s. 27. Hagarty, C.J.O. and Osler, J.A. upheld the enactment as being an almost essential part of railway legislation, while Burton and Maclellan, J.J.A. considered it an unnecessary interference with “property and civil rights in the province.” The injury complained of, we should perhaps state, was trespass to timber in connection with the construction and operation of the road.

As to the applicability of the Dominion Winding-up Acts to companies incorporated under provincial legislation,

see *Shoolbred v. Clarke* (*w*) and other cases under section 91, sub-section 21, *ante*, p. 394.

In like manner, companies incorporated under provincial legislation, for the purpose of carrying on these "local works and undertakings," have without hesitation been held to be subject to the provisions of Dominion law and legislation upon the subject of "navigation and shipping." See *Quaddy River Boom Co. v. Davidson* (*x*) and other cases noted under section 91, sub-section 10.

As to the power of a provincial legislature over a corporation existing prior to Confederation, see *Dobie v. Temporalities Board* (*y*) cited in the notes to section 129, *post*.

In ~~*Jones v. Canada Central*~~ (*z*) it was held that provincial legislation in reference to the bonds of a railway company falling within this sub-section 10 is operative to govern bonds held out of the province. Mr. Justice Osler says:

"I am of opinion that where debts and other obligations arise out of, or are authorized to be contracted under, a local Act which is passed in relation to a matter within the powers of the local legislature, such debts or obligations may be dealt with or affected by subsequent Acts of the same legislature in relation to the same matter, and this notwithstanding that by a fiction of law such debts may be domiciled out of the province."

## 12. The Solemnization of Marriage in the Province.

This sub-section will be found noted, so far as is necessary, in the notes to sub-section 26 of section 91. We may also refer to chapter V., *ante*, page 116, *et seq.*, as to the ex-

(*w*) 17 S. C. R. 265.

(*x*) 10 S. C. R. 222.

(*y*) 7 App. Cas. 133; see *ante*, p. 200.

(*z*) 46 U. C. Q. B. 250. See *Redfield v. Corporation of Wickham*, 13 App. Cas. 467, as to the right of an execution creditor to sell under *fi. fa.*, a Canadian railway as a whole, and the difference, in this respect, between English and Canadian law.



tent to which English marriage law is in force in Upper Canada. Owing to the decided religious convictions of Roman Catholics upon this question, there has been no general legislation by the Dominion parliament upon the subject of marriage and divorce; and its jurisdiction under sub-section 26 of section 91, has been limited to the passage of private Divorce Acts.

### 13. Property and Civil Rights in the Province.

In what may be termed the leading case as to the meaning to be attached to this sub-section, and the range of matters embraced therein—Citizens v. Parsons (a)—it was contended that “civil rights” should be limited to such rights only as flowed from the law, *e.g.*, the *status* of persons, and should not be interpreted to cover rights arising from contract. Had this contention prevailed, the provinces would have been driven out of the larger part of the field of activity, which now, by the authoritative deliverance of the Judicial Committee of the Privy Council in that case, they are undoubtedly entitled to occupy.

“Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words ‘civil rights.’ The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract; and such rights are not included in express terms in any of the enumerated classes of subjects in section 91.

“It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at section 91, it will be found not only that there is no class including,

(a) 7 App. Cas. 96.

generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz: '18.—bills of exchange, and promissory notes,' which it would have been unnecessary to specify, if authority over all contracts, and the rights arising from them, had belonged to the Dominion parliament.

"The provision found in section 94 of the Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides, as throwing light upon the sense in which the words 'property and civil rights' are used. By that section, the parliament of Canada is empowered to make provision for the uniformity of any laws relative to 'property and civil rights' in Ontario, Nova Scotia and New Brunswick, and to the procedure of the courts in these three provinces, if the provincial legislatures choose to adopt the provisions so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is, in the main, the French law as it existed at the time of the session of Canada, and not the English law which prevails in the other provinces. The words 'property and civil rights' are, obviously, used in the same sense in this section as in No. 13 of section 92, and there seems no reason for presuming that contracts, and the rights arising from them, were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words, 'civil rights' contended for by the appellants were to prevail, the Dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec had been carefully left out of the uniformity section of the Act.

"It is to be observed that the same words 'civil rights' are employed in the Act of 14 Geo. III, chapter 83, which made provision for the government of the province of Quebec. Section 8 of that Act enacted 'that His Majesty's Canadian subjects,

*Quebec*

within the province of Quebec, should enjoy their property, usages, and other civil rights as they had before done, and that in all matters of controversy relative to *property and civil rights*, resort should be had to the laws of Canada, and be determined agreeably to the said laws.' In this statute, the words, 'property and civil rights' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion, they are used in a different or narrower one."

The Quebec Act, 1774, referred to in the last paragraph of this quotation, draws a sharp distinction between the criminal and the civil law (*b*), the two branches together being treated as inclusive of the whole field; and the Committee, in holding that the same wide meaning must be given to the term "property and civil rights" in this sub-section, have, it may be thought, decided that the various other sub-sections of section 92 are to be treated as unnecessary surplusage. A reference, however, to those other sub-sections will show that with one or two exceptions, they treat, not of civil rights as between subject and subject, but of what may be called political rights, as between the subject, on the one hand, and the provincial government and bodies organized for the purposes of local self-government throughout the various sections of the province, on the other. The judgment of the Committee does, however, indicate a very wide range of subjects as included within this sub-section—a range subject only to the territorial limitation indicated by the words "in the province," and subject also, as the cases show, to be cut down to the extent necessary to give proper play to the powers of the Dominion parliament under the various sub-sections of section 91. It would seem as if this sub-section really throws the largest "residuum" to the provinces.

As to the first limitation, reference may be had to *Re Goodhue* (*c*), in which it was held by some of the judges

(*b*) See *ante*, p. 105.

(*c*) 19 Gr. 366. See *Jones v. Canada Central*, 46 U. C. Q. B. 250, for some observations by Osler, J. (now J.A.), upon *Re Goodhue*.

that a provincial statute cannot prejudicially affect the rights of a person living out of the province in respect to personal property within. If, however, this is to be taken as more than a decision as to the proper interpretation to be given to the language of the provincial Act there in question, we find it very difficult to agree with it. Although, in a sense, that the law of the domicile governs as to personal property is a rule of private international law which has been admitted into the jurisprudence of many modern states, it is only so in the absence of express legislation in the country in which it is sought to be enforced, and, viewing the matter as a question of power, it seems to us that provincial legislation altering the law in this respect would fall within sub-section 16 of section 92. It may be thought that this view is inconsistent with what has been laid down in chapter IX., *ante*. The question is certainly one of considerable difficulty, but it seems to us that there is a clear distinction between rights arising from contract accrued abroad irrespective altogether of the locality of the property covered by the contract, and rights to be enjoyed by foreigners in respect to property situate in the province. There is no doubt a well recognized distinction between land and movables, but a reference to Von Savigny and other writers on this question of international law, will show that the rule is not by any means universal; and that, in the jurisprudence of many modern states, the *lex loci* governs as well in reference to movables as to land and other immovable property.

We may also refer to the language of the Chancellor of Ontario, in *Re North Perth* (*d*). The particular passage to which we refer will be found quoted at length, *ante*, p. 287. What is there said—although spoken in reference to rights enjoyed by voters as citizens of Canada—accords with the view above expressed, that this sub-section is not to be taken as dealing with a man's rights in relation to the



organized political institutions of a province, but, as the Chancellor puts it, "regards mainly the *meum* and *tuum* as between citizens." See also the language of the Judicial Committee of the Privy Council in Thèberge v. Landry (e).

In reference to the second limitation above noted, that while this sub-section is to be read in the very wide sense indicated by the Committee in Citizens v. Parsons, it is subject always to be cut down and limited by Dominion laws passed in relation to matters falling fairly within any of the sub-sections of section 91, it may, as we have intimated in the notes to the opening clause of section 91 (f), be deemed questionable whether this sub-section 13 can be limited in its scope by anything short of *general* legislation by the Dominion parliament in reference to the various matters comprised in the several sub-sections of section 91. That question has been fully discussed in those notes; but we may here mention that, in the various decisions in which Dominion legislation has been upheld notwithstanding the provisions of this sub-section, such legislation has been general legislation. The decision of the Supreme Court in Quirt v. The Queen (g), is we think the only exception. The decision of the Privy Council in Colonial Building Association v. Attorney-General (Quebec) (h), while it, in effect, upheld the validity of a Dominion Act incorporating the appellant company, lays down that the company, so incorporated, is subject to the local laws of the province in which its business may be carried on—such, for instance, as laws limiting the right of a corporation to hold land. The case of Citizens v. Parsons (i), affords another instance—the appellant company in that case being held to be subject to provincial laws as to the form and effect of contracts entered into by it within the

(e) 2 App. Cas. 102; see *ante*, p. 288. (h) 9 App. Cas. 157.

(f) *Ante*, p. 350, *et seq.*

(i) 7 App. Cas. 96; see *ante*, p. 353.

(g) 19 S. C. R. 510.

province. Upon this question further reference may be had to the notes to sub-sections 10 and 16 of this section 92.

Reverting, now, to the question of the extent to which Dominion legislation of a general character, in reference to matters falling within any of the sub-sections of section 91, may override provincial law as to property and civil rights, we may refer to Cushing v. Dupuy (*j*), in which the Judicial Committee of the Privy Council determined the scope proper to be given to the terms "bankruptcy and insolvency," in sub-section 21 of section 91. The passage will be found quoted in the notes to that sub-section. We may refer also to Doyle v. Bell (*k*), in which it was held by the Court of Appeal for Ontario that Dominion legislation in reference to the conduct of elections of members of the House of Commons of Canada, does not infringe upon the powers of a provincial legislature under this sub-section—or, perhaps we should rather say, that this sub-section must be read subject to the provisions of any Dominion Act dealing with that subject. It should be noticed, however, that the language of the judges in that case recognizes the distinction, afterwards so clearly pointed out by the Chancellor in *Re North Perth*, that the rights of an inhabitant of Ontario in connection with Dominion elections, is one of his political rights in Canada, rather than a civil right in any one province. Hagarty, C.J.O., however, refers to a number of the sub-sections of section 91; any legislation upon which must necessarily deal with rights of property and civil rights in the different provinces, and to a certain extent control and modify the provincial law which ordinarily governs them.

In Russell v. The Queen (*l*), the Judicial Committee of the Privy Council held that the Canada Temperance Act is not an Act in relation to "property and civil rights in the province":

(*j*) 5 App. Cas. 409.

(*k*) 11 O. A. R. 326.

(*l*) 7 App. Cas. 829.

“ Their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, ‘ property and civil rights.’ It has, in its legal aspect, an obvious and close similarity to laws which place restriction on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, *and making it a criminal offence* punishable by fine or imprisonment to violate these restrictions cannot properly be deemed a law in relation to property in the sense in which those words are used in the 91st section. What parliament is dealing with, in legislation of this kind, is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in regard to civil rights. In however large a sense these words are used it could not have been intended to prevent the parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be *criminal* and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting, in some sense, property, and the right of a man to do as he pleases with his own, cannot properly be regarded as being legislation in relation to property or to civil rights. Nor could a law which restricted the sale or exposure of cattle having a contagious disease, be so regarded. Laws of this nature, designed for the promotion of public order, safety, or morals, and which subject those who contravene them to *criminal* prosecution and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of parliament to make laws for the order and good government of Canada, *and have direct relation to criminal law*, which is one of the enumer-



ated classes of subjects assigned exclusively to the parliament of Canada. It was said in the course of the judgment of this Board in the case of the Citizens v. Parsons, that the two sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. Few, if any, laws could be made by parliament for the peace, order, and good government of Canada, which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the province exclusive legislative authority on the subject of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which it really belongs."

There is much in this language which supports what we have said in regard to Dominion legislation being limited to general legislation upon the matters entrusted to it, *as being matters of common concern to the whole country*.

It would seem, therefore, upon review of these authorities that the words of this sub-section are to be interpreted in their largest sense, subject only to the territorial limit to which we have referred; and subject, also, to the abstraction therefrom of so much of the field naturally covered by them as is necessary to afford scope for the operation of the powers bestowed upon the Dominion parliament by the various sub-sections of section 91. Just to what extent such withdrawal from provincial jurisdiction may take place, depends upon the construction to be given to section 91 and its various sub-sections. We may refer in this connection to what was said in chapter X., *ante*, p. 213, *et seq.*, as to the possibility of legislation by one legislature, Dominion or provincial, limiting the range open to the other. In this view it would appear that this sub-section 13, is one, the scope of which will, from time to time, grow narrower as the necessity for general legislation by the Dominion parliament, upon matters covered by the various sub-sections of section 91, increases.



In the notes to other sections and sub-sections we have cited the various cases in which this sub-section 13 of section 92 has been invoked, and need here, therefore, merely indicate the cases and the various sub-sections under which they will be found noted (*m*).

#### 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Our judicial system has already received attention to the extent of an entire chapter (*n*), and in the notes to sub-section 27 of section 91 we have necessarily had to deal with some phases of the criminal law, for which reasons we need here deal merely with certain other details of the general subject and collect those authorities which have not yet been cited. As, however, we refrained, in commenting upon sub-section 27 of section 91, from discussing "the constitution of courts of criminal jurisdiction," there excluded, here included, we may here refer to the difficulties which have arisen in connection with the administration of criminal justice, using the word "criminal" in the restricted sense which, as has been pointed out, it bears in Canadian jurisprudence. The constitution of courts of criminal jurisdiction is—subject to the provisions of section 101, of which more anon—with the provincial governments; the pro-

(*m*) *Re Simmons and Dalton*, 12 O. R. 505, *ante*, p. 286; *Slavin v. Orillia*, 36 U. C. Q. B. 159, *ante*, p. 359; *Beard v. Steele*, 34 U. C. Q. B. 43, *ante*, p. 374; *Reg. v. Robertson*, 6 S. C. R. 52, *ante*, p. 385; *Merchants Bank v. Smith*, 8 S. C. R. 512, *ante*, p. 387; *Clarkson v. Ontario Bank*, 15 O. A. R. 166, *ante*, p. 395; *Re Wallace-Heustis Co.*, 3 Cart. 374, *ante*, p. 400; *McDiarmid v. Hughes*, 16 O. R. 570, *ante*, p. 456; *Monkhouse v. G. T. R.* 8 O. A. R. 637, *ante*, p. 457; *C. S. Ry. v. Jackson*, 17 S. C. R. 316, *ante*, p. 458; *McArthur v. N. & P. Junc. Ry.* 17 O. A. R. 86, *ante*, p. 458; *Reg. v. Wason*, 17 O. A. R. 221, *post*, p. 478; *Reg. v. Robertson*, 3 Man. L. R. 613, *post*, p. 480.

(*n*) Chapter XI., *ante*, p. 223.

cedure in criminal matters is exclusively with the Dominion government; and already it is apparent that it is, in many, if not most, instances, almost impossible to decide with any reasonable certainty whether a law relates to "constitution" or "procedure." In this sub-section, it should be pointed out, the full rounded phrase is used—"constitution, maintenance, and organization"—and the difficulty perhaps is rather to decide between "organization" and "procedure." The authorities which deal with the question of jurors and the position of the jury in relation to the organization of a court have already been cited (*o*). A jury, empanelled and sworn, is part of the "organization" of the court; the selecting and summoning of the members of the jury is "procedure"! Whether a man accused of crime is to be tried with or without a jury is question of "procedure" and can only be determined by the parliament of Canada (*p*). Consequently, in *Reg. v. Toland* (*q*) it has just been held that an Ontario Statute (35 Vic. c. 18, sec. 2) purporting to give to a police magistrate power to try offences under the Dominion Act respecting forgery is *ultra vires*, there being no jury in connection with that tribunal. It would appear that there is here occasion for "remedial" legislation by the parliament of Canada; otherwise the power to constitute courts of criminal jurisdiction is seriously circumscribed. In its organization of those courts, a province may find it difficult to keep pace with the requirements of Dominion laws as to "procedure," unless the parliament of Canada delegates to the provinces the regulation of all procedure in criminal matters, just as it has practically done in the matter of the selecting and summoning of jurors. Another course is open to the Dominion government, for by section 101 (see *post*) the parliament of Canada may, "notwithstanding anything in this Act," constitute additional courts for the better administration of the laws of Canada, and whether the jurisdiction of such "additional"

(*o*) *ante*, p. 416, *et seq.*

(*p*) *Reg. v. Bradshaw*, 38 U. C. Q. B. 564.

(*q*) Not yet reported; July, 1892.

courts would be, or could be made to be, exclusive, would not be of much practical moment, as by attention to "procedure" the provincial guns could be effectually spiked.

In treating of the question of the jurisdiction of courts, Dominion and provincial, we ventured to lay it down that the jurisdictional line in the case of the former is the line which divides those subject matters over which the Dominion parliament has jurisdiction from those committed to provincial legislatures, while as to provincial courts, whether old or new, no such jurisdictional line exists. Herein lies the anomaly of our system. The legislative and executive departments of the federal government are, so far as regards the judicial branch of the latter, and in the absence of resort to section 101, divorced, and the enforcement of the laws of Canada—*i.e.*, Dominion laws—through the courts is in the hands of the provincial governments. To counterbalance one anomaly by another the appointment of part of the organization of the provincial courts is with the Dominion government?

In *Regina v. Horner (r)*, the Court of Queen's Bench (Quebec), upheld the Act of that province respecting district magistrates and magistrates' courts, and the power of the provincial executive to appoint such magistrates. Reference is made by Mr. Justice Ramsay, in delivering the judgment of the court, to *Regina v. Coote (s)*, decided in the Privy Council, as expressly recognizing the power of provincial legislatures to create new courts for the execution of the criminal law, as also to nominate the magistrates to sit in such courts. "So much being established almost all difficulty disappears. The Privy Council recognizes the general principle that the executive power is derived from the legislative power unless there be some restraining enactment." It appears, we should perhaps say, from the report of the case, that the Act in question expressly provided for the appointment of such magistrates by the Lieutenant-Governor in Council.

(r) 2 Steph. Dig. 450; 2 Cart. 317.

(s) L. R. 4 P. C. 599.



To speak now of courts of civil jurisdiction, we may note that in *Ganong v. Bayley* (*t*), in the New Brunswick Supreme Court, it was held by the majority of the court that an Act of the New Brunswick legislature establishing commissioners' courts in that province, and for the appointment by the Lieutenant-Governor in Council of commissioners to preside therein, was valid. The power of the local legislature to establish courts seems to have been treated as beyond question, the point more fully discussed being as to the validity of the Act in so far as it conferred on the Lieutenant-Governor of the province power to appoint the judges who should preside in such courts, and the case, therefore, should perhaps be noted rather as an affirmance of the doctrine that an Act of provincial legislation in reference to the exercise of the prerogatives of the Crown in relation to matters falling within the legislative competence of such legislature, is a proper exercise of its legislative power. The opinions of Chief Justice Allen and Mr. Justice Duff, who dissented from the judgment of the majority of the court, are placed upon the ground that the exercise of this prerogative is, by the B. N. A. Act, vested exclusively in the Governor-General as Her Majesty's only representative in Canada. But, in view of the authorities noted under section 58, *ante*, this view is untenable.

As to the appointment of judges and officers connected with the administration of justice reference may be had to chapter XI. (*ante*, p. 238, *et seq.*), and to the cases in the foot note (*u*).

The question of the power of a provincial legislature to regulate procedure affecting penal laws which such legislature is authorized to enact (*v*), came before the Que-

(*t*) 1 Pug. & Burb. 324; 2 Cart. 509.

(*u*) *Reg. v. Reno*, 4 P. R. (Ont.) 281; *Reg. v. Bennett*, 1 O. R. 445; *Richardson v. Ransom*, 10 O. R. 387; *Ex parte Williamson*, 24 N. B. 64; and *Ex parte Perkins*, *ib.* 66.

(*v*) See s-s. 15, *post*.



bec Courts in three early cases, and was very emphatically affirmed. In *Pope v. Griffith (w)*, a case arising under the Quebec License Act, Mr. Justice Ramsay says :

“ Appellant at once admits that the local legislature have the power to attach a fine, penalty, or imprisonment, to the sale or keeping of spirituous liquors without a license; but that having done that, a crime was created, and that all the procedure connected with the infliction of punishment for this crime must necessarily be fixed by parliament, and could not be fixed by the legislature of the province. In support of this pretension appellant maintains that every infraction of a public law to which any penalty is attached is a crime. . . . Whatever may be the definition of a crime, I would remind those who lean too much upon definitions, of their danger; it will not be denied that, in one sense of the word, the act of which the appellant is accused, is a crime; but it is equally plain that *it is not a crime in the sense of sub-section 27, section 91 of the B. N. A. Act.* Now, if the signification attached to the word “criminal” is restricted when referring to law in this sub-section, why should it be used in a different sense when applied to procedure? It cannot be presumed that in one short paragraph, particularly a paragraph of an enumeration of powers, the legislature should have intended to apply two different meanings to the same word, especially when by doing so they would be transferring the legislation with regard to a purely local matter to parliament. The rule is all the other way.”

In *Ex parte Duncan (x)*, Mr. Justice Dunkin held that 34 Vic. c. 2 (Quebec) taking away the right to *certiorari*, to remove proceedings in civil matters before a district magistrate, was valid, and that under the term “civil matters,” a proceeding before a district magistrate for the enforcement of penalties under a license law of the province would be included.

“These words ‘civil’ and ‘criminal’ are used in a sense which excludes from the idea conveyed by the latter and includes within that conveyed by the former this matter of ‘punishment

(w) 16 L. C. Jur. 169; 2 Cart. 291.

(x) 16 L. C. Jur. 188; 2 Cart. 297.

by fine, penalty, or imprisonment, for enforcing any law” which, under this 92nd section, a province alone can legally enact. Jurisdiction is characterized simply as being civil or else criminal. Crime—of whatever kind or degree—can be created, its punishment assigned, and procedure relative to it laid down by parliament alone. No enactment of a local legislature can give to any Act that quality, or subject it to that punishment, or bring it within the purview of that procedure. But every local legislature without let or hindrance from parliament—and therefore without need of aid from parliament—can impose punishment by fine, penalty, or imprisonment, for enforcing certain laws, which it alone can make. . . .

“Whatever infractions of law, whether as to matters of Dominion or provincial (y) legislation, parliament sees fit to designate as crimes, it—and it alone—can so declare, and as such punish, and to that end regulate procedure. Whatever infractions of any provincial law coming within the purview of this 92nd section, parliament may not see fit thus to deal with, the interested province may punish by fine, penalty, or imprisonment; but its so doing does not make the offence to be thus punished a crime, nor the procedure laid down in order to its punishment procedure in a criminal matter. On the contrary,<sup>3</sup> *such whole matter must remain a civil matter, within what is here the true meaning of these respective terms.*

In Page v. Griffith (z), Mr. Justice Sanborn expresses the same opinion, intimating that, in his view, the power to prescribe procedure in criminal matters refers to “the general public criminal law comprised in the criminal statutes of the Dominion and in the common law. This view is confirmed by the Criminal Procedure Act, which has no reference whatever to local penal laws, but to laws in force throughout the Dominion,” and in Cote v. Chaveau (a), the law is laid down to the same effect by Mr. Justice Casault.

(y) See *ante*, p. 414.

(z) 17 L. C. Jur. 302; 2 Cart. 308.

(a) 7 Q. L. R. 258; 2 Cart. 311.

Having held valid the provincial game laws, the full Court of Queen's Bench of Manitoba, in 1886 (*b*), adopted the view which was then practically recognized in all the other provinces, that procedure in connection with prosecutions under such laws is matter of exclusively provincial jurisdiction. We say practically recognized, although the question was only in 1890 authoritatively passed upon in Ontario by the Court of Appeal for that province in *Reg. v. Wason* (*c*), a case which will call for more extended notice in the notes to sub-section 15, *post*.

In *Reg. v. Bittle* (*d*), the Divisional Court of the Common Pleas Division, reviewed the decisions upon this question. MacMahon, J., delivering the judgment of the court, upholding the validity of R. S. O. c. 61, s. 9, which provides that, in proceedings under provincial Acts, the defendant is neither a competent nor compellable witness, refers to the diversity of nomenclature applied to provincial laws falling within this sub-section—"provincial criminal laws" (7 App. Cas. 840); "penal laws" (2 Cart. 291); "a civil matter within the true meaning of these respective terms" (2 Cart. 297)—adopts the language of *Hodge v. Reg.*, that, however styled, such laws are "not in conflict with No. 27 of section 91," and concludes:

"It is manifestly clear from the authorities that the procedure by the tribunals intrusted with adjudicating on the offences so created cannot be prescribed by the Dominion parliament."

It was held in Manitoba, by Mr. Justice Killam (*e*), that the provisions of the Dominion Act (46 Vic. c. 17) (*f*), for the reception in evidence of certified copies of documents

(*b*) *Reg. v. Robertson*, 3 Man. L. R. 613; see notes to s-s. 15, *post*.

(*c*) 17 O. A. R. 221.

(*d*) 21 O. R. 605.

(*e*) *McKilligan v. Machar*, 3 Man. L. R. 418.

(*f*) See R. S. C. c. 139; see particularly section 10, which makes applicable to proceedings under Dominion law, provincial laws of evidence "subject to the provisions of this and other Acts of the parliament of Canada."



and records in the Dominion Lands Office, were *ultra vires*, }  
so far as they might be taken to apply to suits merely for  
the cancellation, as clouds upon title, of conveyances regis- }  
tered under the Lands Registration Act of Manitoba. As  
the point is of some importance, and, so far as we are  
aware, has not been touched upon in any other case, we  
quote somewhat at length from his judgment :

“It does not appear to me that the Dominion parliament could make any binding provision as to the nature of the evidence to be received in a case like the present. The suit is one to determine the right to, or property in, certain lands in this province. The decision of the question may involve to a certain extent the interpretation of statutes of the parliament of Canada, and of orders of the Governor-General in Council ; but the suit is not instituted under any authority of the Dominion parliament. Whether there had been, at a certain date, a grant from the Crown, represented by the Governor-General, of lands held for the benefit of the Dominion, must be determined by a consideration of certain statutes and Orders in Council, as well as of evidence of acts done under them. This court, in interpreting those statutes and Orders in Council, has to apply the ordinary rules of interpretation. In so far as the Dominion parliament lays down rules to show the meaning of its own statutes they will be used for the purpose, just as any statement in any document of the meaning of certain phrases or words therein, will be used in the interpretation of the document. This, however, in no way shows, that the Dominion parliament could lay down rules as to the method of proving acts done under its statutes, or Orders of the Governor-General in Council. Whether the registration of an instrument appearing to show a claim adverse to that of the real owner of land, forms a cloud upon the title of the owner which should be removed by a decree of this court, is a matter upon which the provincial legislature alone could legislate; though in such a suit, title may be deduced from the Crown, holding originally for the Dominion. The provincial legislature has the authority to regulate the administration of justice in the province, including procedure in civil matters in the courts ; though it has in some cases been held that the Dominion parliament could establish courts for the determination of matters arising under



statutes within its powers, or, perhaps, regulate to some extent, procedure in the ordinary courts, in suits upon subjects within its legislative authority."

Whittier v. Diblee (*g*), is simply a *quere* whether the Dominion Act, 32 & 33 Vic. c. 39, relating to costs against justices is not *ultra vires* of the federal parliament as relating to procedure in a civil matter. It is difficult to suggest any principle in denial of the right of the Dominion parliament, as part of general legislation in regard to a criminal law, to pass an Act protecting magistrates in the exercise of their criminal jurisdiction in the proper sense of that term.

We have already noted some cases which deal with the question of the position of imprisoned debtors, and may here refer to some others dealing with the same topic. Prior to Confederation, there were no county courts in Nova Scotia. By an Act in force in the Province of Nova Scotia at the Union, every debtor imprisoned under process in any court, was entitled to apply for and, on certain conditions, to obtain his discharge. Doubts having been expressed as to the jurisdiction of the county courts established after Confederation to entertain such application, an Act of the provincial legislature was passed making the above provisions applicable to persons imprisoned by county courts; and this Act was held (*h*) to be valid, as being a matter relating to procedure in "civil" matters in provincial courts. With this case should be compared the Queen v. Chandler (*i*), an earlier decision of the New Brunswick Supreme Court, which with other cases will be found noted more fully in sub-section 21 of section 91.

The Supreme Court of New Brunswick, in *Ex parte Ellis* (*j*), upheld the validity of a provincial Act for the

(*g*) 2 Pug. 243; 2 Cart. 492.

(*h*) Johnston v. Poyntz, 2 Rass. & Geld. 193; 2 Cart. 416.

(*i*) 1 Hannay, 556; 2 Cart. 421.

(*j*) 1 Pug. and Burb. 593; 2 Cart. 527.

imprisonment of a person making default in payment of a sum of money due on a judgment in certain cases as being a matter relating to proceeding in "civil" matters and not falling within the criminal law, or the law relating to bankruptcy and insolvency. Allen, C.J., says :

"Now surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice, and procedure in civil matters in the province; all of which are expressly within the jurisdiction of the provincial legislature. Having therefore the right to legislate on these subjects, the 15th sub-section gives them power to enforce any such laws by imposing *imprisonment*. It would seem, therefore, that the powers conferred by this Act are directly within the 92nd section of the B. N. A. Act."

Mr. Justice Weldon dissented from the judgment of the majority of the court, the legislation impugned being, in his opinion, legislation relating to the criminal law.

Other cases in which reference has been made to this sub-section will be found in the foot note (*k*). Those sub-sections of section 91 which involve "procedure" as an essential part of any legislation thereon are treated of generally in chapter XI, *ante*, p. 236, and more particularly in the notes to the sub-sections themselves.

(*k*) *Wilson v. McGuire*, 2 O. R. 118, *ante*, p. 232; *Peak v. Shields*, 8 S. C. R. 591, *ante*, p. 235; *Reg. v. Bush*, 15 O. R. 398, *ante*, p. 239; *Re N. Perth*, 21 O. R. 538, *ante*, p. 240; *Valin v. Langlois*, 5 App. Cas. 115, *ante*, p. 287; *Re Wetherell and Jones*, 4 O. R. 713, *ante*, p. 346; *Cushing v. Dupuy*, 5 App. Cas. 409, *ante*, p. 391; *Crombie v. Jackson*, 34 U. C. Q. B. 575, *ante*, p. 393; *Armstrong v. McCutchin*, 2 Cart. 494, *ante*, p. 397; *Reg. v. Boardman*, 30 U. C. Q. B. 553, *ante*, p. 410; *Reg. v. Lawrence*, 43 U. C. Q. B. 164, *ante*, p. 411; *Reg. v. Roddy*, 41 U. C. Q. B. 291, *ante*, p. 415; *Ward v. Reid*, 3 Cart. 405, *ante*, p. 416; *Atty.-Genl. of Quebec v. Reed*, 10 App. Cas. 141, *ante*, p. 431; *Plummer Wagon Co. v. Wilson*, 3 Man. L. R. 68, *ante*, p. 433; *Dulmage v. Douglas*, 3 Man. L. R. 562, *ante*, p. 434; *Crawford v. Duffield*, 5 Man. L. R. 121, *ante*, p. 434; *Reg. ex rel. McGuire v. Birkett*, 21 O. R. 162, *ante*, p. 445; *McArthur v. N. & P. Junc. Ry.* 17 O. A. R. 86, *ante*, p. 458; *Reg. v. Amer*, 42 U. C. Q. B. 391, *ante*, p. 259; *Lenoir v. Ritchie*, 3 S. C. R. 575, *ante*, p. 317; *Re Squier*, 46 U. C. Q. B. 474; see notes to section 96, *post*.

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

*Hear*  
*Hear*  
This sub-section was required in order to round up the sphere of authority of the provinces and make the legislative and executive departments, beyond doubt, co-terminous. By it, moreover, that power to "sanction" its enactments without which law is but a *brutum fulmen*, is placed within the hands of provincial legislatures. Subject to the <sup>outrage</sup> anomaly perpetrated by section 96, the provinces have control to the farthest bounds over the execution of provincial laws.

In the notes to the last sub-section (14), the authorities were collected which have now clearly established that the matters covered by this sub-section are not "criminal" in the sense of sub-section 27 of section 91, but "must remain civil matters within what is here the true meaning of these respective terms"; and the procedure necessary to enforce punishment for breach of any provincial law is procedure in a "civil" matter.

But, by whatever name called, the body of laws passed under the authority of this sub-section must necessarily present features closely resembling the ordinary criminal law as it is to be found in the Dominion statute books, and because this fact is the one most prominent in *Reg. v. Wason* (1), we have left that case to be noted here rather than under sub-section 13, although, as will appear, the decision of the Court of Appeal for Ontario was unanimously to the effect that the provincial legislation there impugned was legislation as to "property and civil rights." The statute in question was entitled "An Act to protect

(1) 17 O. A. R. 221.

against frauds in the supplying of milk to cheese or butter manufactories," and by its first section it provided that "no person shall knowingly and wilfully" supply diluted, adulterated, or skimmed milk to a cheese or butter manufactory without notifying the owner or manager of such dilution, etc., under a penalty as provided in the Act. The Divisional Court of the Queen's Bench Division declared the Act *ultra vires*, on the ground, as put by Armour, C.J., that "the primary object of the Act is to create new offences and to punish them by fine, and, in default of payment, by imprisonment, and this is its true nature and character." Mr. Justice Street dissented, and his view was adopted by the Court of Appeal. He says in his judgment:

"Is it an Act constituting a new crime for the purpose of punishing that crime *in the interest of public morality*? Or is it an Act for the regulation of the dealings and rights of cheesemakers and their patrons, with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law; if under the latter, I think it is good as an exercise of the rights conferred on the province by the 92nd section of the B. N. A. Act. An examination of the Act satisfies me that the latter is its true object, intention and character."

It may now, therefore, be taken, so far as the courts of Ontario are concerned, that the criterion here suggested is to be our guide in determining this question in any given case. As will have been noticed, the difference in opinion which existed in the Queen's Bench was as to the primary object of the Act there impugned, the majority of the court answering Mr. Justice Street's questions in the reverse way. It would appear, therefore, that, as Mr. Justice Osler puts it, "Thou shalt not" is not necessarily "criminal" legislation within the meaning of the B. N. A. Act.

"The legislature when really dealing with property and civil rights must have power to say 'thou shalt' or 'thou shalt not,'



and, as the breach of the legislative command is always, in one sense, an offence, the line between what may, and what may not be lawfully prescribed without touching upon 'criminal' law is sometimes difficult to ascertain, and may shift according to circumstances. . . . The criminal law, so far as regards human legislation, in its ultimate object, even when dealing with public order, safety, or morals, is chiefly concerned with preventing and punishing the violation of personal rights and rights respecting property, and hence, in a very wide sense, with property and civil rights. But while in this sense, and in making provisions applicable to the community at large, whether we speak of all the confederated provinces or of one, the right to legislate rests with parliament, I do not see how the right can be denied to the provincial assemblies to legislate for the better protection of the rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade, or upon other subjects coming within section 92, and to punish the infraction of the law in a suitable manner, so long, at all events, as parliament has not occupied the precise field; for I suppose it will not be denied that the latter may draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute: *Hodge v. The Queen*, 9 App. Cas. at p. 131. But if a particular species of fraud has not been converted into a crime by Dominion legislation, I think that the local legislature must be at liberty to deal with it for the better protection of the class of persons immediately affected by it."

We have quoted this passage at length, because it expresses views in relation to the question of "concurrent" powers which go far to support what we have ventured to lay down in chapter X. (*ante*, p. 213, *et seq.*) upon this vexed question.

Having held the Act *intra vires*, the Court of Appeal decided without hesitation that the procedure laid down for its enforcement was procedure in a civil matter within the meaning of sub-section 14 of section 92.

To the like effect, the full Court of Queen's Bench, in Manitoba, in *Queen v. Robertson (m)*, held that laws relating to

(m) 3 Man. L. R. 613. This case is noted more fully under the next s-s. 16.

the killing and possession of game at certain seasons of the year, are laws relating to property and civil rights. Reference is made to the works of Blackstone and other old writers as showing that the taking of animals *feræ nature* is an ordinary right which, in the absence of legislation, any citizen possesses; and therefore that laws curtailing such rights are laws relating to civil rights in the province, within the meaning of this sub-section.

The query in *Regina v. Boardman (n)*, as to the power of a provincial assembly to pass a *general* law in reference to the punishment to be meted out for violation of provincial laws, is now answered in favor of the power—so far at all events as the authority of the Court of Appeal for Ontario extends—by the decision of that tribunal in *Attorney-General (Canada) v. Attorney-General (Ont.) (o)*. It would seem also to be covered by the principle of *Hodge v. The Queen (p)*, applied *a fortiori*.

However, as late as July, 1890, Mr. Justice Wurtele, of the Quebec Superior Court, held, in *Tarte v. Béique (q)*, that a provincial legislature, for enforcing a law made by it, must enact a special fine or imprisonment, and cannot confer the power on any person or body of persons to determine what penalty shall be incurred by a violation of such law. But this seems to be qualified by a remark, made later, that the legislature has no power to decree that the punishment of an offender shall be at the discretion of the court before which he may be tried. No reference is made in the judgment to the doctrine enunciated in *Queen v. Burah*, and the other cases, particularly *Hodge v. The*

(n) 30 U. C. Q. B. 553; see *ante*, p. 410.

(o) 19 O. A. R. 31.

(p) 9 App. Cas. 117.

(q) 6 Mont. L. R. 289. It was also held in this case that a commission of inquiry issued by a Lieutenant-Governor in Council, under a provincial statute, is not a judicial tribunal, and does not possess any *inherent* power to commit for contempt.

Queen (*r*), which support the doctrine of “plenary powers”; and it is difficult in view of these authorities to acquiesce in the correctness of this decision.

In *Bennett v. The Pharmaceutical Association* (*s*), it was held by Chief Justice Dorion, that the provisions of the Quebec Pharmacy Act, 1875, appropriating fines imposed for breaches of that Act to the respondent corporation, was *intra vires*:

“It can direct that a portion or the whole of it shall be for the benefit of the prosecutor, or of a municipal or other corporation, just as it distributes the provincial revenue, in any manner it may choose to direct. It had the same power to enact that the fines levied under the Act should be for the benefit of the society respondent as it would have, after receiving the fines as part of the provincial revenue, to order that the amount should be paid back to the society for the objects of its incorporation.”

a decision which is in agreement with the later decision of the Court of Appeal for Ontario in the case above noted (*t*), in which general legislation authorizing the Lieutenant-Governor in Council to remit fines, etc., if thought proper, was upheld.

In the province of Quebec conflicting decisions were given in certain cases which came before the Courts of that province in 1871-3. Mr. Justice Drummond held (*u*) that the local legislature could not authorize punishment by both fine *and* imprisonment, and in this view he was followed by Mr. Justice Torrance (*v*). In *Paige v. Griffith* (*w*), Mr. Justice Sanborn declined to follow the earlier cases, and construed the word “or” as being cumulative. In *Blouin v. Quebec* (*x*), Chief Justice Meredith intimated his agree-

(*r*) See *ante*, p. 177, *et seq.*

(*s*) 1 Dor. 336; 2 Cart. 250.

(*t*) *Atty.-Gen. (Can.) v. Atty.-Gen. (Ont.)*, 19 O. A. R. 31.

(*u*) *Ex parte Papin*, 15 L. C. Jur. 334; 2 Cart. 320.

(*v*) *Ex parte Papin*, 16 L. C. Jur. 319; 2 Cart. 322.

(*w*) 18 L. C. Jur. 119; 2 Cart. 324.

(*x*) 7 Q. L. R. 18; 2 Cart. 368.

ment with the view which had also been expressed in earlier cases in that province that a local legislature has no power to impose hard labor as a term of imprisonment under this sub-section 15; but the contrary has now been distinctly held by the Judicial Committee of the Privy Council in *Hodge v. The Queen*, which also supports the cumulative reading of the word "or" (*xx*).

16. Generally all matters of a merely local or private nature in the Province.

This sub-section must be read in connection with—perhaps we should say, subject to—the concluding paragraph of section 91:—

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

As has been pointed out, the grammatical connection of this concluding paragraph of section 91 with this sub-section 16 is now clearly established by authority. In note (xi) to the opening paragraph of section 91 we referred to the concluding paragraph of that section as weakening somewhat the argument that the legislative power conferred on the Dominion parliament should be limited to the passing of general laws, to operate throughout Canada or for the general benefit of Canada as a whole; because it would seem to be implied that matters would come before the Dominion parliament for legislative action which upon

(*xx*) For other cases in which this sub-section has received attention, see:

- Reg. v. Lawrence, 43 U. C. Q. B. 164, *ante*, p. 411;
- Reg. v. Shaw, 7 Man. L. R. 518, *ante*, p. 412;
- Reg. v. Roddy, 41 U. C. Q. B. 291, *ante*, p. 415;
- Reg. v. Lake, 43 U. C. Q. B. 515, *ante*, p. 415;
- Pope v. Griffith, 2 Cart. 291, *ante*, p. 472;
- Ex parte Duncan*, 2 Cart. 297, *ante*, p. 472;
- Page v. Griffith, 2 Cart. 308, *ante*, p. 473.



their face, so to speak, would appear to be matters of a merely local or private concern in one province. It may be argued, however, that what is meant by the concluding paragraph of section 91 is simply this: that if a Dominion law, *ex hypothesi* of a general character, should affect local and private interests in one province in a particular manner, or to a degree peculiar to such province, such law must not on that account be deemed to be a law relating to a matter of a merely local or private nature in such province, and therefore invalid. For example, a general law in relation to sea-coast fisheries might peculiarly or even exclusively affect one province—and so as to the establishment of lighthouses, inter-provincial or international ferries, and other matters which might be named. We have already discussed various aspects of this question (y). It is involved in the larger question as to “concurrent” powers (so-called), and as to the difference in the range of matters open to one legislature in the absence or presence of legislation enacted by the other. If the powers of the parliament of Canada are, in every instance, powers of general legislation only, it would appear that all laws for the peace, order, and good government of a province as a self-governing unit, passed in relation to matters not covered by general legislation by the parliament of Canada upon those matters of common concern committed to it, would be laws of a “merely local or private nature in the province.” In this view no difficulty would arise from the limitation upon the scope of the term “municipal institutions”; for as a province could itself pass, so it could delegate to a municipal body power to pass, any laws in relation to local self-government not overborne by general laws passed by the parliament of Canada in the interests of the Dominion as a whole. In this connection we may refer to what was laid down by Lord Selborne in *L’Union St. Jacques v. Bélisle* (z):

(y) See *ante*, p. 213, *et seq.*; and note (xi) to sec. 91, *ante*, p. 350.

(z) L. R. 6 P. C. 31.

“The *onus* is on the respondent to show that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.”

a passage which is immediately followed by that other which we have already quoted, to the effect that, in the various sub-sections of section 91, there is no indication *in any instance* of anything being contemplated beyond what may be properly described as general legislation.

The main difficulty about the whole matter is that the “residuun” of subject matters is assigned to the parliament of Canada. But here again it may be argued that the legislation must be general, for the peace, order and good government of Canada as a federal Dominion, and that, in truth, the “residuum,” at any given moment, must be with the provinces, the matters comprised in such “residuum” being deemed matters of a local or private nature in each province as would be evidenced by the absence of general federal legislation thereon.

The whole subject is one upon which much may be said, but, confining our attention now to this sub-section 16, we proceed to indicate what particular provincial legislative Acts have been held to fall within it.

In *L'Union St. Jacques v. Bélisle*, above referred to, an Act of the Quebec legislature, passed in aid of a society which was in financial straits, forcing commutation upon certain annuitants, was held to be an Act relating to a matter of a merely local or private concern in the province. It was contended—held in the judgment appealed from—that the legislation was insolvency legislation, and the Judicial Committee intimated that if a Dominion Act had been in existence making such acts on the part of the society as were authorized by the statute in question, acts of insolvency rendering all societies who committed them liable to be wound up under insolvency proceedings, it might be that the statute in question would have been

*ultra vires*; but that, as no such general Dominion legislation was in existence, the Quebec statute was *intra vires* as relating to a matter which, *as the law stood*, must be taken to be a matter of local concern in Quebec.

In *Dow v. Black (a)*, an Act of the New Brunswick legislature authorizing a levy to pay a "bonus" to a railway extending beyond the boundaries of the province was upheld under this sub-section.

In *Hodge v. The Queen (b)*, the regulation of taverns, etc., was held to fall within this sub-section, although in the earlier case of *Russell v. The Queen (c)*, the "local option" character of the Canada Temperance Act did not, in the opinion of the Committee, make that Act other than one for the peace, order and good government of Canada, falling within the residuary clause of section 91:

"The Act as soon as it was passed became a law for the whole Dominion, and the enactment of the first part, relating to the machinery for bringing the second part into force, took effect, and might be put in motion at once and everywhere within it. . . . The manner of bringing the prohibitions and penalties into force, which parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the parliament alone can so deal with it."

In *Hodge v. The Queen* the regulations there supported were said not to conflict with the Canada Temperance Act, "which was not locally adopted." In a number of the cases which dealt with the question of the power of a provincial legislature to deal with certain phases of the liquor traffic, *dicta* are to be found to the effect that the exercise of regulative power falls within this sub-section as a

(a) L. R. 6 P. C. 272.

(b) 9 App. Cas. 117.

(c) 7 App. Cas. 829.

matter of "police" (*d*), for the repression of disorderly and riotous conduct such as would injuriously affect local morals and local good government; but there can be no doubt that upon the adoption of the Canada Temperance Act all such provincial powers in relation to that traffic would be overborne.

And so as to "nuisances," it was held in *Ex parte Pillow* (*e*), that the power of a provincial legislature to pass, or to authorize a municipal body to pass, laws for their abatement as being injurious to the public health of the community, was not in conflict with the power of the parliament of Canada to pass, as part of the criminal law of the Dominion, a general law as to nuisances. ✓

In *Bennett v. The Pharmaceutical Association* (*f*), it was held by Chief Justice Dorion:

"The determining of the age or other qualifications, required by those residing in the province of Quebec, to manage their own business, or to exercise certain professions or certain branches of business attended with danger or risk for the public, are local subjects in the nature of internal police regulations; and in passing laws upon those subjects, even if those laws incidentally affect trade and commerce, it must be held that this incidental power is included in the right to deal with the subjects placed especially under their control, the exercise of which can not be considered to be unconstitutional. The Pharmacy Act of 1875, in so far as this case is concerned, does not regulate trade and commerce. It merely determined the *status* of persons exercising the business of chemist and druggist. This is a civil right coming clearly within the powers of the local legislature."

(*d*) See the cases collected in the notes to s. 91, s.-s. 2, *ante*, p. 359, *et seq.* In *Slavin v. Orillia*, the late Sir Wm. Richards collects a number of American authorities as to "police" powers.

(*e*) 27 L. C. Jur. 216; 3 Cart. 357. See also *Reg. v. Wason*, noted under s.-s. 15; it would support laws as to "nuisances" as being for the protection of property and civil rights.

(*f*) 1 Dor. 336; 2 Cart. 250.



It has been held (*g*), by the full Court of Queen's Bench of Manitoba that provincial Acts, regulating the killing and possession of game at certain seasons of the year, are *intra vires*. Mr. Justice Killam, in delivering the judgment of the court, refers to the action of the Dominion parliament in not assuming to pass any such laws, and to their action in placing among the subjects of legislation by the Council of the North-West Territories the subject "Game and wild animals, and the protection thereof"; venturing the opinion that the Dominion parliament would not be likely to give to the North-West Council powers of legislation more extended than those possessed by provincial legislatures. Apart from this consideration, the statutes were held to fall within both sub-sections 13 and 16 of section 92. The object of such Acts is said to be "essentially local." "It is to secure the increase, or to prevent at any rate as far as possible the decrease of the supply of game within the province." *Hodge v. The Queen* is spoken of as showing that a law is considered to be local within the meaning of this sub-section, although having operation throughout the whole of the province, and although the subject with which it deals may be an important subject of legislation in other provinces also; and further, that the sub-section cannot be confined in its operation to local and private, as distinguished from public Acts. The judgment discusses these various matters in a most instructive and interesting way. The difficulty we have to contend with in all these cases is that formerly noted in reference to *Hodge v. The Queen*, namely, that in scarcely any of them is the legislation upheld under this sub-section alone. This is, of course, to be expected, but at the same time it increases the difficulty

(*g*) *Reg. v. Robertson*, 3 Man. L. R. 613. See also, *ante*, p. 414 and p. 480.

one finds in attempting to assign a limit to the scope of the sub-section (*gg*). *X*

### *Education.*

93. In and for each Province the Legislation respecting education. Legislature may exclusively make laws in relation to Education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union:

(2) All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dis-

(*gg*) For other cases, see *Cleveland v. Melbourne*, 4 Legal News, 2 Cart. 241, in which an Act of the Quebec Legislature authorizing the Lieutenant-Governor in Council to revoke the right to exact tolls on a toll-bridge (for default in making repairs) and to transfer the bridge to others, was upheld. Note this case in connection with *Atty.-Gen. of Can. v. Atty.-Gen. of Ont.*, 19 O. A. R. 31. See also:—

*Reg. v. Mohr*, 2 Cart. 257, *ante*, p. 351;

*Quirt v. Reg.*, 19 S. C. R. 510, *ante*, p. 354;

*Re Windsor and Annapolis Ry.* 3 Cart. 387, *ante*, p. 400;

And see also the cases under section 92, sub-sections 8, 10 and 11, *ante*.

sentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec:

- (3) Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education.
- (4) In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada

may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section.

In reference to the position of what are known as "separate" or denominational schools, it will be advisable to treat the entire subject in one place, for although the position of the provinces and territories acquired since Confederation is somewhat different from that of the provinces, original parties to the Union, there is so much ground common to all the provinces in connection with this question that it might lead to undue repetition were we to divide the discussion.

This section *§* with its sub-sections, was somewhat modified in the case of Manitoba, but, as we shall have occasion to show, upon the admission of Prince Edward Island and British Columbia, this section as it stands was, with other parts of the B. N. A. Act, made applicable to those provinces as if they had been originally parties to the Union. The North-West Territories are in a somewhat peculiar position with regard to this question, owing to the legislative supremacy exercised over these territories by the Dominion parliament. Although, therefore, we deem it advisable to treat the whole subject in this place, it will be equally advisable to consider the matter by provinces.

#### *Ontario and Quebec.*

At the date of Confederation that part of the then province of Canada known as Upper Canada had a Roman Catholic separate school system established by law—26 Vic. c. 5: "An Act to restore to Roman Catholics in Upper



Canada certain rights in respect to separate schools." With the political agitation which resulted in the passage of this Act, and the subsequent agitations for its repeal, we have of course nothing to do here. There was also upon the statute book of (old) Canada an Act conferring rights and privileges upon Protestants and "coloured people" in regard to the establishment of separate schools. The separate schools of the "coloured people," not being denominational, are not protected by the B. N. A. Act. Immediately prior to Confederation it was in contemplation to pass an Act placing the denominational minorities of what is now the province of Quebec in the same position as the Roman Catholic minority of the Upper Province, but no Canadian legislation took place upon the subject, the end aimed at being secured by sub-section 2 of this section 93, which sub-section, as it is applicable to only the one province of Quebec, we need not further consider, beyond noting that it puts the two provinces of Quebec and Ontario upon so much the same footing that we are justified in dealing with these two provinces together.

Prior to Confederation the position of the Roman Catholic minority in Upper Canada, under the Roman Catholic Separate School Act, had been considered in the courts of that part of the province, and the view taken by those courts is summed up in the following extract from the judgment of Hagarty, C.J., in *Free v. McHugh* (*h*):

"As Burns, J., remarked in *Re Ridsdale & Brush*, 22 U. C. Q. B. 124: 'The legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favor'; and my brother Gwynne, commenting

on these words in *Harding v. Mayville*, says, at p. 511 of 21 U. C. C. P., that ‘it lies on the plaintiff claiming exemption as a separatist to aver and prove all those exceptional matters, taking him out of the general rule.’ ”

These exceptional and special rights—privileges enjoyed by religious minorities in the different districts of the provinces over and above those rights enjoyed at common law or under statutory enactment by the inhabitants of the province at large—are the rights and privileges protected by this 93rd section, and we may conclude our remarks as to the provinces of Ontario and Quebec, so far as the position of those provinces requires separate treatment, by saying that, having in view what is laid down by the Judicial Committee of the Privy Council in *Winnipeg v. Barrett* (i), the rights and privileges referred to, and protected by the various sub-sections of section 93, may be shortly stated as follows:

1. The right to establish denominational schools;
2. The right to invoke state aid in the collection of taxes necessary for the support of such schools from the supporters thereof;
3. The privilege of exemption from taxation for the support of the public schools of the province;
4. The privilege of having taught in such separate schools the religious tenets of their denomination;

to which we should perhaps add the right or privilege which any member of any denomination has to choose, as between the separate schools of his denomination and the public schools of the province, which he will support. Any legislation of a compulsory character would be unconstitutional as prejudicially affecting the right or privilege which such persons had by law at the date of Confederation.

(i) See *post*.

In *Board of School Trustees v. Grainger* (*j*), Vice-Chancellor Blake had to consider the general effect of this section 93 and its various sub-sections. Shortly stated, his decision was that provincial legislatures have full power of legislation in relation to education and educational systems in the province, including the separate school system therein, so long as such legislation does not offend against the provisions of sub-section 1, that is to say, does not *prejudicially* affect any right or privilege thereby protected; and he refers to sub-sections 3 and 4 as indicative of the expectations of the framers of the B. N. A. Act that there would be legislation by provincial legislatures in relation to denominational schools. The validity of such legislation is, in a sense, recognized by the deliverance by the Divisional Court of the Chancery Division of an opinion (*k*) on certain questions submitted to that tribunal as to the effect to be given to certain clauses of the Assessment Act of Ontario working amendment of the separate school law as it existed at the Union by making more elaborate provision for classifying ratepayers into two classes: supporters of public, and supporters of separate, schools; although, we should note, no discussion seems to have taken place, and no expression of opinion is to be found in the judgment, upon this constitutional question. The matter however appears so clearly upon the construction of the statute that, so far as we are aware, no doubt has ever been expressed as to the correctness of the views enunciated by Vice-Chancellor Blake. As put by him in the case we have cited:

“It would be a most unfortunate result of this enactment, if it were found that it precluded the remedying defects in, or improving the machinery for, working out the separate school system. . . . It is therefore clear that the provincial legis-

(*j*) 25 Grant, 570.

(*k*) *In re R. C. Sep. Schools*, 18 O. R. 606. See also *Trustees of R. C. Sep. School v. Arthur*, 21 O. R. 60.

lature has some power to legislate as to denominational schools; and it is scarcely possible to conceive a case in which it could, and should, more properly interfere than where, as here, it is asked to remove an ambiguity in the working of the Act, and to give to separate schools the same class of machinery for carrying on its work, as is given to the public schools—a machinery which, after much thought and many years experience, is found to be the best and simplest we have yet had.”

It has been contended that owing to the appeal provided for by sub-section 3, and the power given to the parliament of Canada to pass remedial laws in certain cases, under sub-section 4, the question of the validity of separate school legislation has been entirely withdrawn from the courts, but this has been decisively negatived by the judgment of the Judicial Committee of the Privy Council in *Winnipeg v. Barrett* (*l*), which we shall have occasion to note more at length when we come to deal with the position of Manitoba in reference to this matter of separate schools. In reference to this question of appeal, and its effect upon the jurisdiction of the ordinary tribunals, Lord Macnaghten in delivering the judgment of the Committee, says:

“At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-sections 2 and 3 (*m*) do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.”

It devolves upon the courts, therefore, in any given case, to decide whether or not any provincial legislation regarding denominational schools does, or does not, “*prejudicially*” affect any right or privilege with respect to denominational schools which any class of persons have by law in the provinces at the Union.”

(*l*) 3 Times L. R. 745.

(*m*) Sections 3 and 4 of the B. N. A. Act.



*Nova Scotia, New Brunswick, Prince Edward Island,  
and British Columbia.*

The affirmance by the Privy Council (*n*) of the judgment of the Supreme Court of New Brunswick, in *Ex parte Renand* (*o*), places the provinces above named in the same position upon this question. All are governed by the provisions of section 93 and its sub-sections, and only in the event of the future establishment of a system of separate or dissentient schools by any one of these provinces, can their full autonomy in relation to educational matters be interfered with by the parliament of Canada. In none of these provinces other than New Brunswick could the claim to a "right or privilege" existing at the time of the Union be as strongly supported as it was in the last-named province; and the position of affairs there is so clearly disclosed and the legal question so exhaustively treated by the judgment of Chief Justice Ritchie—now Sir Wm. Ritchie, Chief Justice of the Supreme Court of Canada—that we venture to quote somewhat fully from it:

"It is contended that the rights and privileges of the Roman Catholic inhabitants of this province, as a class of persons, have been prejudicially affected by the Common Schools Act, 1871, contrary to the provisions of sub-section 1 of section 93 of the B. N. A. Act. We have now to determine whether any class of persons had, by law in this province, any right or privilege with respect to denominational schools at the Union, which are prejudicially affected by the Common Schools Act of 1871. This renders it necessary that we should, with accuracy and precision, ascertain exactly what the state of the law was with reference to denominational schools, and the rights of classes of persons in respect thereto, at the Union. At that time, what may fairly and legitimately be called the common school system of the province was carried on under an Act passed in 21 Vic. (c. 9)

(*n*) See *post*.

(*o*) 1 Pug. 273; 2 Cart. 445. For the political turmoil raised by this decision, see Dom. Sess. Pap., 1877, No. 89.

entitled “An Act relating to Parish Schools.” There were, no doubt, at the same time in existence, in addition to the schools established under the Parish School Act, schools of an unquestionably denominational character, belonging to and under the immediate government and control of particular denominations, and in which there can be no doubt, or it may reasonably be inferred, the peculiar doctrines and tenets of the denominations to which they respectively belonged were exclusively taught, and therefore had, what may rightly be esteemed, all the characteristics of denominational schools, pure and simple. . . . It is obvious that there were in existence at the time of the Union, and have been ever since in this province, apart from schools established under the Parish School Act, denominational schools, recognized by the legislature, and aided from the public revenues.

“But as it is not contended that the Common Schools Act prejudicially affects any right or privilege with respect to *these* schools which any class of persons had by law at the Union, it will be necessary to examine minutely and critically the Parish School Act of 1858, under which, it is contended, ‘rights and privileges’ existed, which, it is alleged, have been so affected. . . . The Parish School Act, 1858, clearly contemplated the establishment throughout the province of public common schools for the benefit of the inhabitants of the province generally; and it cannot, we think, be disputed that the governing bodies under that Act were not, in any one respect or particular, ‘denominational.’ . . . The schools established under this Act were, then, public parish or district schools, not belonging to or under the control of any particular denomination; neither had any class of persons, nor any one denomination—whether Protestant or Catholic—any rights or privileges in the government or control of the schools, that did not belong to every other class or denomination, in fact, to every other inhabitant of the parish or district; neither had any one class of persons or denomination, nor any individual, any right or privilege to have any peculiar religious doctrines or tenets exclusively taught or taught at all, in any such school. What is there, then, in this Act to make a school established under it a denominational school, or to give it a denominational character? . . . It has been said that

under the Parish School Act, schools were in fact established in certain localities where all, or a large majority, of the ratepayers happened to belong to one particular persuasion in which the catechisms of particular churches were taught, prayers peculiar to a particular religious body were used, and books inculcating the doctrines, views, and practices of a particular denomination were used as class-books ; and that these schools were therefore denominational, and consequently the class of persons belonging to any such denomination had a legal right or privilege with respect to denominational schools. Assuming what has been alleged to have been the case—though on this point we have no information before us of which we can take judicial notice—surely it is begging the whole question. How can the mere fact that, in exceptional cases, certain schools under the Parish School Act, drawing provincial aid, may have been made, for the time being, with or without the knowledge or sanction of the Board of Education, denominational, by reason of the teacher instructing the children exclusively in doctrines of a particular denomination, or using the prayers or books, or daily teaching the catechism peculiar to such denomination, confer any legal right or privilege on any class of persons with respect to denominational schools, or give the denomination whose tenets may have been so taught in any such schools, rights and privileges other than those possessed by all and every the humblest inhabitant of the parish in which such schools existed free and independent of all denominational connection ? It is not by what the Board of Education, Superintendent, Inspectors, or Trustees may have done, or allowed to be done under the Act, nor is it from the mode in which the principles of Christianity may have been actually taught in one or a hundred schools which may have drawn public money under the Parish School Act, that the question in a legal view must be determined ; we must look to the law as it was at the time of the Union, and by that, and that alone, be governed. Where, then, do we find any legal exclusive right or privilege conferred on any denomination to any school established, or that might be established under that Act ; or any right or privilege conferred on any class of persons to deal with such a school as belonging to such persons as a class or denomination ; or as being under their control as such ; or that, as a class, they



had any right to have taught therein the peculiar doctrines of their denomination? . . . If, then, the establishment of denominational schools, or the teaching of denominational doctrines, was not recognized or provided for by the Act, and the Roman Catholics had therefore no legal rights, as a class, to claim any control over, or to insist that the doctrines of their church should be taught in all or any schools under the Parish School Act, how can it be said (though, as a matter of fact, such doctrines may have been taught in numbers of such schools) that as a class of persons they have been prejudicially affected in any legal right or privilege with respect to 'denominational schools,'—construing those words in their ordinary meaning—because under the Common Schools Act, 1871, it is provided that the schools shall be non-sectarian. . . . But it is contended that the section declaring 'that all schools conducted under the provisions of this Act shall be non-sectarian,' prejudicially affects the rights and privileges which the Roman Catholics, as a class, had in the parish schools at the time of the Union. It cannot be denied that to the provincial legislatures is confided the exclusive right of making laws in relation to education; and that they, and they only, have the right to establish a general system of education applicable to the whole province and all classes and denominations, provided always they have due regard to the rights and privileges protected by section 93 of the B. N. A. Act. Now, what, in this case, is the right or privilege claimed to have been prejudicially affected? Is it a legal right or privilege that could have been put forward and enforced by the Roman Catholics, as a class, under all circumstances, and in every parish or common school; or is it a legal right confined to the Roman Catholics as a body; or does it belong equally to all and every of the other denominations of Christians in this province, and capable by them of enforcement; or, on the contrary, was it not the mere possible chance of having religious denominational teaching in certain schools, depending entirely upon accidental circumstances; as, on what might happen to be the religious views of the majority in a parish, and then on the accidental result of the election of trustees and school committees, and on the views of the parties so elected as to religious denominational teaching, and their willingness to permit it in the schools



(admitting that the trustees or committee had any discretion in the matter, which is more than doubtful); was it not also dependent on the Board of Education who had the general controlling power? If depending on circumstances such as these, how can it be considered such a legal right as could have been contemplated by the Imperial parliament in passing the 93rd section of the B. N. A. Act? Where is there anything that can, with any propriety, be termed a legal right? Surely the legislature must have intended to deal with legal rights and privileges. How is it to be defined?—How enforced?"

It should be noted that all the members of the court concurred in upholding the constitutionality of the Act, and this judgment was upheld (in another case) upon appeal to the Judicial Committee of the Privy Council—*Maher v. Portland (p)*—the judgment of the Committee being delivered without calling upon the respondents. It simply expressed concurrence in the views of the New Brunswick Supreme Court.

### *Manitoba.*

This province became part of the Dominion in 1870, and by what is popularly known as the Manitoba Act (33 Vic. c. 3, Dom.), the power of the provincial legislature in reference to education is defined :

Legislation  
touching  
schools sub-  
ject to certain  
provisions

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions :—

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union :

(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education :

(3) In case any such Provincial Law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

Power  
reserved to  
Parliament.

So far as affects the general question, we need here only point out that one important distinction (*q*) to be drawn between this section and section 93 of the B. N. A. Act, and its sub-sections, is in the insertion of the words "*or practice*," after the word "law" in sub-section 1. The insertion of these words rendered necessary an inquiry into the nature of the school system existing in the province of Manitoba at the time when that province became part of the Dominion. The whole matter is thus discussed, and disposed of by the Judicial Committee of the Privy Council in the two cases of Winnipeg v. Barrett, and Winnipeg v. Logan, before referred to:

"These two appeals were heard together. In the one case the City of Winnipeg appeals from a judgment of the Supreme Court of Canada (*r*), reversing a judgment of the Court of Queen's Bench for Manitoba, and in the other from a subsequent judgment of the Court of Queen's Bench for Manitoba, following the judgment of the Supreme Court. The judgments under appeal quashed certain by-laws of the City of Winnipeg, which authorized assessments for school purposes in pursuance of the Public Schools Act, 1890, a statute of Manitoba to which Roman Catholics and members of the Church of England alike take exception.

(*q*) Another equally important one will be found noted *post*.

(*r*) 19 S. C. R. 374.

“ Sub-sections 1, 2 and 3 of section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sections of section 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in sub-section 1, the words ‘by law’ are followed by the words ‘or practice,’ which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not, perhaps, very easy to define precisely the meaning of such an expression as ‘having a right or privilege by practice.’ But the object of the enactment is tolerably clear. Evidently the word ‘practice’ is not to be construed as equivalent to ‘custom having the force of law.’ Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools which any class of persons practically enjoyed at the time of the Union.

“ What, then, was the state of things when Manitoba was admitted to the Union? On this point there is no dispute. It is agreed that there was no law or regulation or ordinance with respect to education in force at the time. There were therefore no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the Union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Tache, the Roman Catholic archbishop of St. Boniface, who has given evidence in Barrett’s case, has been accepted as accurate and complete. ‘There existed,’ he says, ‘in the territory now constituting the province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations. The means necessary for the support of Roman Catholic schools were supplied, to some extent, by school fees, paid by some of the parents of the children who attended the schools, and the rest were paid out of the funds of the church contributed by its members. During the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and



the members of the Protestant denominations had no interest in or control over the schools of the Roman Catholics. There were no public schools in the sense of state schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of the Roman Catholic children and were not under obligation to and did not contribute to the support of any other schools.' Now, if the state of things which the archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the Union would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics, and of other religious bodies, in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a 'natural right' which 'does not want any legislation to protect it.' Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing 'by practice' has no more operation than the protection which it purports to afford to rights and privileges existing 'by law.' It can hardly be contended that, in order to give a sub-



stantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.

“Manitoba having been constituted a province of the Dominion in 1870, the provincial legislature lost no time in dealing with the question of education. In 1871 a law was passed which established a system of denominational education in the common schools, as they were then called. A board of education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the province had been divided into twenty-four electoral divisions, for the purpose of electing members to serve in the Legislative Assembly. By the Act of 1871 each electoral division was constituted a school district, in the first instance. Twelve electoral divisions, ‘comprising mainly a Protestant population,’ were to be considered Protestant school districts; twelve, ‘comprising mainly a Roman Catholic population,’ were to be considered Roman Catholic school districts. Without the special sanction of the section there was not to be more than one school in any school district. The male inhabitants of each school district, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the school, in addition to what was derived from public funds. It is, perhaps, not out of place to observe that one of the modes prescribed was ‘assessment on the property of the school district,’ which must have involved, in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant school, and an assessment on Protestants for the support of a Roman Catholic school. In the event of an assessment there was no provision for exception, except in the case of the father or guardian of a school child—a Protestant in a Roman Catholic school district or a Roman Catholic in a Protestant school district—who might escape by sending the child to the school of the nearest district of the other section and contributing to it an amount equal to what he would

have paid if he had belonged to that district. The laws relating to education were modified from time to time, but the system of denominational education was maintained in full vigor until 1890. An Act passed in 1881, following an Act of 1875, provided among other things that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and a Roman Catholic district might include the same territory in whole or in part. From the year 1876 until 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school or a Roman Catholic ratepayer for a Protestant school. In 1890 the policy of the last nineteen years was reversed, and the denominational system of public education was entirely swept away. Two Acts in relation to education were passed. The first (53 Vic. c. 37) established a department of education and a board consisting of seven members, known as the 'Advisory Board.' Four members of the board were to be appointed by the department of education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the Advisory Board was to prescribe the forms of religious exercises to be used in the schools. The Public Schools Act, 1890 (53 Vic. c. 38), enacted that all Protestant and Roman Catholic school districts should be subjected to the provisions of the Act, and that all public schools should be free schools. The provisions of the Act with regard to religious exercises are as follows :—'(6) Religious exercises in the public schools shall be conducted according to the regulations of the Advisory Board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises shall take place. (7) Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and, upon receiving authority from the trustees, it shall be the duty of the teachers to hold such religious exercises. (8) The public schools shall be entirely non-sectarian, and no religious exercises shall be

allowed therein except as above provided.' The Act then provides for the formation, alteration, and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. In cities the municipal council is required to levy and collect upon the taxable property within the municipality such sums as the school trustees may require for school purposes. A portion of the legislative grant for educational purposes is allotted to public schools; but it is provided that any school not conducted according to all the provisions of the Act, or any Act in force for the time being, or the regulations of the Department of Education, or the Advisory Board, shall not be deemed a public school within the meaning of the law and shall not participate in the legislative grant. Section 141 provides that no teacher shall use or permit to be used as text books any books except such as are authorised by the Advisory Board, and that no portion of the legislative grant shall be paid to any school in which unauthorised books are used. Then there are two sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant school district and by a Roman Catholic school district. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favor if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant school district exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants.

“Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the Union. *Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference.*



*No child is compelled to attend a public school.* No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics or for members of the Church of England (if their views are correctly represented by the bishop of Rupert's Land, who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault; it is owing to religious convictions, which everybody must respect, and to the teaching of their church, that Roman Catholics and the members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

"Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned Judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act of 1890 are in reality Protestant schools. The legislature has declared in so many words that the public schools shall be entirely unsectarian, and that is carried out throughout the Act."

In a sense this decision has no reference to the other provinces or to the North-West Territories. So far as Manitoba alone is concerned, it decisively disposes of the ques-



tion. The Manitoba Act, 1870, was afterwards confirmed by Imperial legislation, and put beyond the legislative competence of the Dominion parliament to alter it in any particular; and the time within which the Manitoba School Act might have been disallowed by the Governor-General in Council has long since expired.

In view, however, of this decision much discussion has taken place in reference to the powers of the Governor-General in Council under sub-section 3, and of the parliament of Canada under sub-section 4. So far as the province of Manitoba is concerned, it is to be noticed, that the opening clause of sub-section 3 of section 93 of the B. N. A. Act is not contained in the corresponding sub-section of the Manitoba Act, 1870, and, therefore, the fact that, since its admission to the Dominion, there has been legislation in that province which might be contended to have established a system of separate schools there, can have no bearing upon this question. As to that province the pronouncement of the Privy Council is decisive, that the Manitoba Public Schools Act does not affect, prejudicially or otherwise, any right or privilege protected by section 22 of the Manitoba Act, 1870.

It may not, however, be out of place to consider the position of all the provinces in reference to this matter of an appeal to the Governor-General in Council, and of the power of the Dominion parliament to pass "remedial" laws. The provision as to an appeal to the Governor-General in Council is a very peculiar one, because no provision whatever is made for the enforcement of the decision of the Dominion executive, otherwise than by legislation by the Dominion parliament under sub-section 4. The language of the Committee, in *Barrett v. Winnipeg*, leads one to infer that, in their opinion, the functions of the Governor-General in Council are not of a judicial character, that is to say, that it does not properly devolve upon the Dominion executive to consider the constitutionality of provincial enact-

ments, or of the decision of the "provincial authority" (whatever that may be taken to mean) mentioned in the sub-section. The appeal, therefore, would seem to be limited to supervising and suggesting alterations to provincial enactments, "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects, in relation to education." In the event of the ruling, decision, or whatever it may be called, of the Dominion executive not being duly executed by the provincial authorities, the provisions of sub-section 4, may be invoked. But as a condition precedent to any right to interfere with provincial legislation, one must be able to predicate that in the province concerned there exists any "right or privilege" enjoyed by the Protestant or Roman Catholic minority in such province, and that the provincial legislation complained of affects such right or privilege. It is to be noted that the word 'prejudicially' does not occur in this sub-section, and this bears out the view for which we have been contending, that interference on the part of the Dominion authorities can properly take place only in connection with valid provincial legislation. Legislation *prejudicially* affecting such right or privilege is void. Legislation affecting it otherwise than prejudicially is valid, but may be clumsy and unworkable. Such defects the parliament of Canada can remedy.

We have attempted in a former place to summarize the rights and privileges enjoyed by the religious minorities of Ontario and Quebec, and, as to the other provinces, the position would seem to be, at best—from the separatist standpoint—that indicated in the judgment of the Privy Council in *Winnipeg v. Barrett*, although, perhaps, it is matter of doubt whether the rights and privileges there enumerated as to Manitoba, exist to their full extent in the other provinces. In fact, the judgment in *Ex parte Renaud* (affirmed, as we have seen, in the Privy Council) seems to indicate that in the provinces other than Ontario, Quebec, and Manitoba, religious denominations have no "right or

privilege" *by law* in respect to education, within the meaning of, and requiring the protection of, the various subsections of section 93. The question which suggests itself as doubtful is as to the power to entirely prohibit denominational schools, or, in other words, to compel universal attendance at state schools.

*The North-West Territories.*

The parliament of Canada having power (subject always to the paramount legislative supremacy of the Imperial parliament) to pass laws for the "peace, order and good government" of these territories, not as yet elevated to provincial dignity (*s*), the position of affairs there is as yet embryonic. In respect to educational matters, the powers of the Legislative Assembly are at present circumscribed, as will appear from the following section of the North-West Territories Act—R. S. C., c. 50.

14. The Lieutenant-Governor in Council (*t*) shall pass all necessary ordinances in respect to education; but it shall therein always be provided, that a majority of the ratepayers of any district or portion of the Territories, or of any less portion or sub-division thereof, by whatever name the same is known, may establish such schools therein as they think fit, and make the necessary assessment and collection of rates therefor; and also that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish separate schools therein—and in such case, the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof:

2. The power to pass ordinances, conferred upon the Lieutenant-Governor by this section is hereby declared to have been vested in him from the seventh day of May, 1880.

(*s*) See *ante*, p. 347. The position of these Territories will be dealt with more at length in Part IV.

(*t*) Now the Legislative Assembly. See *post*.

It is much to be hoped that when (as will doubtless soon be the case) new provinces are erected in these Territories, they will be given full control of educational matters. In expressing this hope we perhaps "travel beyond the record."

*Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.*

**94.** Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

Legislation  
for uniform-  
ity of Laws in  
three Pro-  
vinces.

Nothing has ever been done toward carrying out this idea. The only use to which the section has been put has been in utilizing the expression "property and civil rights" which occurs in it as a key to the interpretation of the same term in sub-section 13 of section 92. The passage in *Citizens v. Parsons* is quoted at length in the notes to that sub-section.





from the respective Bars of those Provinces.

**98.** The Judges of the Courts of Selection of Judges in Quebec. Quebec shall be selected from the Bar of that Province.

**99.** The Judges of the Superior Courts shall hold office during good Tenure of office of Judges of Superior Courts. behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

**100.** The salaries, allowances, and Salaries, &c., of Judges. pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

*“Judicature.”*—We have already devoted a chapter to a discussion of our judicial system (*u*), and it remains now merely to refer to the question of the “tenure of office” of those judges whose appointment under the 96th section is with the Dominion government. The B. N. A. Act contains no express provision beyond section 99, which applies only to the Superior Court judges, and beyond what may be inferred from the provision in section 100 that the salaries of all these judges are to be “fixed and provided” by the parliament of Canada.

Does the power to appoint carry with it the power to remove? It is submitted that it does, and that, notwith-

(*u*) See chapter XI. and notes to s. 92, s-s. 14.

standing sub-section 14 of section 92 by which "the administration of justice in the province" is assigned to provincial legislatures, the parliament of Canada alone can legislate (subject, as to Superior Court judges, to section 99) as to the qualifications and nature of tenure (including, of course, provisions as to removal from office) of the judges mentioned in section 96. In *Re Squier (v)* the validity of a commission of enquiry issued by the Governor-General purporting to be under the Imperial Act (22 Geo. III. c. 75) relating to the removal of colonial officers, was in question. It seems to have been admitted on the argument and held by the court that the legislative assembly of Ontario, had no power to abolish the old Court of Impeachment established before Confederation by the parliament of (old) Canada for trying complaints against County Court judges—C. S. U. C. c. 14. The precise ground is not stated, but as a proceeding under the Consolidated Statute is enumerated as one of the methods of attack then open, the decision could not have been based on the ground of the "repugnancy" of such provincial legislation to Imperial enactment. Such ground would equally affirm the invalidity of the original Act, and the decision therefore must be taken to be that legislation in reference to the removal of those judges mentioned in section 96 must come from the Dominion parliament.

General Court  
of Appeal, &c.

**101.** The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the Laws of Canada.

This section, too, has already been fully discussed. In chapter XI. we have endeavored to make clear that the jurisdiction of any "additional courts" established by the Dominion parliament under this section must be limited to the administration of laws passed by that parliament, or in relation to matters falling within the purview of its powers.

The particular line of division adopted to secure the administration of justice throughout Canada is a very illogical one, so far as relates to provincial courts. While power to constitute courts, with such jurisdiction, civil or criminal, as may be deemed expedient, is with the provincial legislatures, the judges in the most important of them must be appointed by the Dominion government, and the "procedure" in criminal matters in any of them which have jurisdiction over such matters—as well as procedure in all those branches of jurisprudence which are wrapped up in the various sub-sections of section 91 (*w*)—is matter to be regulated exclusively by the parliament of Canada. As to any additional courts to be established by the Dominion parliament under this section, the position is entirely different. The provinces should, on any logical division, have been given full control of provincial courts. Then if Dominion laws were found to be unsatisfactorily administered in those courts, the reserve power of this section 101 could be invoked. As has been before intimated, a duly constituted court of law, no matter by what authority constituted, must give effect to the law which governs the "legal relations" arising out of the facts in question in any litigation, by whatsoever duly constituted authority those legal relations are determined; and therefore the appointment of the judges by the Dominion government was in no way necessary for the administration of Dominion law; if appointed by the provincial governments, they would be equally bound by their oaths of office to

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*9ad!*  
Sin J. A.

(*w*) See *ante*, p. 235, *et seq.*



administer that law when applicable to the facts of the case. In any event, this section 101 would sufficiently protect the federal government in the administration of federal law.

Under the authority conferred by this section was established the Supreme Court of Canada as a general court of appeal for the Dominion. What its jurisdiction shall be is of course for the parliament of Canada to determine. In *Clarkson v. Ryan* (x) it was held that a provincial legislature has no power to affix conditions or limitations upon appeals to the Supreme Court. That is entirely for the federal parliament.

#### VIII.—REVENUES; DEBTS; ASSETS; TAX- ATION (y).

Creation of  
Consolidated  
Revenue Fund.

**102.** All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

Expenses of  
collection, &c.

**103** The Consolidated Revenue Fund of Canada shall be permanently charged

(x) 17 S. C. R. 251.

(y) It is thought advisable to note this group together. See the general discussion in note (i) following section 126. The matter of the other notes sufficiently appears in their italicized head-lines.

with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the Governor-General in Council, until the Parliament otherwise provides.

**104.** The annual interest of the public debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada.

Interest of  
Provincial  
public debts.

**105.** Unless altered by the Parliament of Canada, the salary of the Governor-General shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon.

Salary of  
Governor-  
General.

**106.** Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.

Appropriation  
from time to  
time.

**107.** All stocks, cash, banker's balances, and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned,

Transfer of  
stocks, &c.

shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union.

Transfer of  
property in  
schedule.

**108.** The public works and property of each Province, enumerated in the third Schedule to this Act, shall be the property of Canada.

#### THE THIRD SCHEDULE.

*Provincial Public Works and Property to be the Property of Canada.*

1. Canals, with Land and Water Power connected therewith.
- ✓ 2. Public Harbours (z).
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements (a).
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies (b).
7. Military Roads.
8. Custom Houses, Post Offices and all other Public Buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property (c).
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general public purposes.

Property in  
lands, mines,  
&c.

**109.** All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New

- (z) See note (ii) following sec. 126, *post*.  
 (a) " (iii) " " " "  
 (b) " (iv) " " " "  
 (c) " (v) " " " "

Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

**110.** All assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to that Province. Assets connected with Provincial debts.

**111.** Canada shall be liable for the debts and liabilities of each Province existing at the Union. Canada to be liable for Provincial debts.

**112.** Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon. Debts of Ontario and Quebec.

**113.** The assets enumerated in the fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly. Assets of Ontario and Quebec.

#### THE FOURTH SCHEDULE.

*Assets to be the Property of Ontario and Quebec conjointly.*

Upper Canada Building Fund. ●

Lunatic Asylums.



Normal School.  
 Court Houses, }  
     in                }  
 Aylmer.            }  
 Montreal.          }  
 Kamouraska.       }  
                           } Lower Canada.  
 Law Society, Upper Canada.  
 Montreal Turnpike Trust.  
 University Permanent Fund.  
 Royal Institution.  
 Consolidated Municipal Loan Fund, Upper Canada.  
 Consolidated Municipal Loan Fund, Lower Canada.  
 Agricultural Society, Upper Canada.  
 Lower Canada Legislative Grant.  
 Quebec Fire Loan.  
 Tamiscouata Advance Account.  
 Quebec Turnpike Trust.  
 Education—East.  
 Building and Jury Fund, Lower Canada.  
 Municipalities Fund.  
 Lower Canada Superior Education Income Fund.

Debt of Nova  
Scotia.

**114.** Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debt of New  
Brunswick.

**115.** New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

**116.** In case the public debts of Nova Scotia and New Brunswick do not at the Union amount to eight million and seven million dollars respectively, they shall respectively receive by half-yearly payments in advance from the Government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Payment of  
interest to  
Nova Scotia  
and New  
Brunswick.

**117.** The several Provinces shall re-tain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

Provincial  
public pro-  
perty.

**118.** The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures :

Grants to  
Provinces.

Dollars.

Ontario	-	-	-	-	Eighty thousand.
Quebec	-	-	-	-	Seventy thousand.
Nova Scotia	-	-	-	-	Sixty thousand.
New Brunswick	-	-	-	-	Fifty thousand.

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Two hundred and sixty thousand ; and an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population as ascertained by the Census of one thousand eight hun-

dred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial Census until the population of each of those two Provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the Public Debt of that Province in excess of the several amounts stipulated in this Act.

Further grant  
to New  
Brunswick.

**119.** New Brunswick shall receive by half-yearly payments in advance from Canada for the period of ten years from the Union an additional allowance of sixty-three thousand dollars per annum; but as long as the Public Debt of that Province remains under seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

Form of  
payments.

**120.** All payments to be made under this Act, or in discharge of liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Can-

ada otherwise directs, be made in such form and manner as may from time to time be ordered by the Governor-General in Council.

**121.** All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces. Canadian manufactures, &c.

**122.** The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada. Continuance of Customs and Excise Laws.

**123.** Where Customs duties are, at the Union, leviable on any goods, wares, or merchandises in any two Provinces, those goods, wares, and merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on proof of payment of the Customs duty leviable thereon in the Province of exportation, and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of importation. Exportation and Importation as between two Provinces.

**124.** Nothing in this Act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen of title three of the Revised Statutes of New Brunswick, or in any Act amending that Lumber dues in New Brunswick (d).

(d) See note (vi) following section 126, *post*.



Act before or after the Union, and not increasing the amount of such dues; but the lumber of any of the Provinces other than New Brunswick shall not be subject to such dues.

Exemption of  
public lands,  
&c.

**125.** No lands or property belonging to Canada or any Province shall be liable to taxation (*e*).

Provincial  
Consolidated  
Revenue  
Fund.

**126.** Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund to be appropriated for the public service of the Province.

(i) “*Revenues, etc.*”—In arriving at a determination of the line of division of revenues, etc., effected by this group of clauses we must bear in mind what is said by Lord Watson in delivering the judgment of the Judicial Committee of the Privy Council in a case to which we have already had occasion to refer—*St. Catharines’ Milling Co. v. The Queen* (*f*):

“There can be no *a priori* probability that the British Legislature, in a branch of the statute which professes to deal only

(*e*) See note (vii) following section 126, *post*.

(*f*) 14 App. Cas. 46, at p. 59. See notes to sec. 91, s-s. 24, *ante*.

with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets."

by way of application of which rule to the case then in hand, he says :

"The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in those lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

It is matter for remark, too, that in construing these sections, the Committee has taken into consideration the "high political nature" of the B. N. A. Act. In Attorney-General of Ontario v. Mercer (*g*), they speak of "the attribution of royal territorial rights for purposes of revenue and government." Their reference in the later case to *a priori* probabilities indicates the use of aids to the interpretation of these sections somewhat wider than those which they have felt free to use in construing the various sub-sections of sections 91 and 92, which provide for the division of the field of subject matters proper for legislative action between the Dominion and the provinces.

Owing to the reference made in these sections to the power of appropriation over the duties and revenues arising in the pre-Confederation provinces we may refer to what has been already said in chapter II. (*h*). Taking up the thread at the date of the Union Act, 1840, the Committee thus characterize its provisions upon this head (*i*) :

"By an Imperial statute passed in the year 1840 (3 & 4 Vic. c. 35) the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, *inter alia*, enacted that in consideration of certain annual payments which Her Majesty had agreed to

(*g*) 8 App. Cas. 767.

(*h*) *Ante*, p. 35, *et seq.*

(*i*) 14 App. Cas. at p. 55.

accept by way of 'civil list,' the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces should be paid into the Consolidated Revenue Fund of the said province. There was no transfer to the province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all monies realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown. That continued to be the right of the province until the passing of the British North America Act, 1867."

The Consolidated Revenue Fund created by this Act was to be appropriated—subject to the payment of the "civil list" charges—by the Canadian parliament "for the public service in such manner as they shall think proper." We should, perhaps, point out that the 42nd section of the Union Act, 1840, limited the right of the then province to dispose of the "waste lands of the Crown," but this section was repealed by 17 & 18 Vic. c. 118, s. 6. We may refer also to the Imperial Act, 10 & 11 Vic. c. 71, which handed over to the province the control of the civil list. Prior to Confederation, therefore, the parliament of (old) Canada had the fullest power of appropriation over these territorial and other revenues, as had also the assemblies of the Maritime Provinces over the revenues therein arising (*j*).

The scheme of division of assets, etc., effected by the B. N. A. Act has been the subject of exhaustive examination by the Judicial Committee of the Privy Council in the two cases to which we have above referred. We quote from the judgment in the later case (*k*):

See note (*b*), *ante*, p. 40.

(*k*) *St. Catharines' Milling Co. v. The Queen*, 14 App. Cas. at p. 56 *et seq.*

“The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective provinces included in the Union, on the one hand, and the Dominion on the other. The conflicting claims to the ceded territory maintained by the Dominion and the province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments it must be always kept in view that, wherever public land with its incidents is described as ‘the property of’ or as ‘belonging to’ the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

“Section 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the Schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of ‘lands set apart for general public purposes.’ It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use. The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is section 102. It enacts that all ‘duties and revenues’ over which the respective legislatures of the united provinces had and have power of appropriation, ‘except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred upon them by this Act,’ shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to which duties and revenues arising within the limits of Ontario, and over which the legislature of the old province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favor of the new provincial legislatures.



"The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise by means of direct taxation for provincial purposes in terms of section 92 (2). The first of them, *which appears to comprehend the whole sources of revenue reserved to the provinces by section 109*, is of material consequence." After quoting this section at length, the judgment proceeds: "In connection with this clause it may be observed that by section 117 it is declared that the provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject matter of the first exception, and the property which is directly appropriated to the provinces; but it hardly admits of doubt that *the interests in land, mines, minerals, and royalties, which by section 109 are declared to belong to the provinces, include, if they are not identical with, the 'duties and revenues' first excepted in section 102.*"

"The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, *the entire beneficial interest of the Crown in all lands within its boundaries*, which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117. Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion all the ordinary territorial revenues of the Crown arising within the provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario v. Mercer*, where the controversy related to land granted in fee simple to a subject before 1867, which became escheat to the Crown in 1871. The Lord Chancellor (Earl Selborne) in delivering judgment in that case said: 'It was not disputed in the argument for the Dominion at the bar, that all territorial revenues arising within each province from lands (in which term must be comprehended all estates in land) which at the time of the Union belonged to the Crown, were reserved to the respective provinces by section 109; and it

was admitted that no distinction could, in that respect, be made between lands then ungranted, and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the Union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the Union were in private hands, and did not then belong to the Crown.' Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the province as 'lands'; but they held that it fell within the class of rights reserved to the province as 'royalties' by section 109.

" . . . The ceded territory was at the time of the Union land vested in the Crown, subject to 'an interest other than that of the province in the same,' within the meaning of section 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed."

Any controlling effect which might be claimed in respect of "lands reserved for the Indians" by reason of the legislative power of the Dominion in respect thereof is negatived in the passage already quoted (l).

In Attorney-General of Ontario v. Mercer (m) the meaning of the word "royalties" was discussed and without deciding whether it does or does not cover royal rights other than those connected with lands, mines, and minerals, it was held that it does cover all royal rights—*jura regalia omnia ad fiscum spectantia*—connected with those three subjects, and escheats within a province were adjudged to belong to such province and not to the Dominion.

In the case of The Liquidators of the Maritime Bank v. The Receiver-General of New Brunswick (n) it has just been held that the prerogative right of the Crown to claim priority for debts due the Crown over the claims of private

(l) *Ante*, p. 525.

(m) 8 App. Cas. 767. See *Church v. Blake*, 2 Q. L. R. 236.

(n) 8 Times L. R. 677.

creditors, is a prerogative right vested in the Lieutenant-Governor of a province so far as relates to debts due the Crown as representing such province—a decision which would appear to show that it was not necessary to rely solely upon the word “royalties” as vesting in the provinces (or in the Lieutenant-Governors as chief executive officers thereof) the Crown’s prerogative rights in connection with lands escheated for want of heirs. See, however, *Attorney-General of British Columbia v. Attorney-General of Canada* (o), in which the Committee held that a conveyance by the province to the Dominion of “public lands” was, in substance, an assignment merely of its right to appropriate the territorial revenues arising therefrom, and could not without express evidence of intention in that behalf, be construed as a transfer of the precious metals in, upon and under such lands, the revenues derivable therefrom not being incident to the land (as are mines of baser metal), but arising from the prerogative rights of the Crown, which, under the word “royalties,” passed to the provinces by force of section 109.

In reference to those sections of this group VIII. which deal with the financial arrangements agreed upon by the provinces as the basis of the federal Union, we deem it unnecessary to say anything here. “Better terms” have been sought and granted in the case of a number of the provinces (p). The whole policy of provincial “subsidies” has been the subject of much adverse comment, but, in any case, these financial arrangements are hardly matter for discussion in a work of this kind. The same may be said of the “interprovincial free trade,” section (121).

(ii) “*Public Harbours.*”—It was held in *Holman v. Green* (q) by the Supreme Court of Canada that this in-

(o) 14 App. Cas. 295. See *post*, Part IV, Chap. XV.

(p) See a short resumé of them in Houston, “Const. Doc. of Canada,” p. 237.

(q) 6 S. C. R. 707.

cludes all harbours, together with the bed and soil thereof, which the public have the right to use, and is not limited to such as at the date of the Union had been artificially constructed or improved at the public expense; and where a grant of the foreshore of a natural harbour used as such by the public was made by a provincial government, the grant was held invalid.

(iii) "*Rivers and Lake Improvements.*"—"Rivers" is a mistake. River improvements are clearly intended. See *per* Gwynne, J., in *Reg. v. Robertson (r)*. In the Quebec Resolutions it appears as "River and Lake Improvements."

(iv) "*Railways, etc.*"—In *Western Counties Ry. Co. v. Windsor & Annapolis Ry. Co. (s)* it was held by the Judicial Committee of the Privy Council that the Dominion government acquired provincial railways—*i.e.*, government railways—subject to all claims against them, or, in other words, for no larger interest than the province had in them. It was a *quære* with the Committee whether the parliament of Canada could afterwards legislate in derogation of claims against, or obligations incurred by, the province in respect of such railways.

(v) "*Ordnance property.*"—See *Kennedy v. Toronto (t)*.

(vi) "*Lumber Dues in New Brunswick.*"—The right to levy these duties was surrendered in 1871, upon certain terms as set out in 36 Vic. c. 41 (Dom.).

(vii) "*Exemption of public lands, etc.*"—See *Church v. Fenton (u)*, and *Reg. v. Wellington (v)*. In *Attorney-General of Canada v. Montreal (w)* it was held by the Supreme Court of Canada that lands under lease to the Do-

(r) 6 S. C. R. at pp. 98-99.

(s) 7 App. Cas. 178.

(t) 12 O. R. 201.

(u) 5 S. C. R. 239; see notes to sec. 91, s-s. 24.

(v) 17 O. A. R. 421; *sub nom.* Quirt v. Reg. 19 S. C. R. 510.

(w) 13 S. C. R. 352.



minion government for military purposes cannot be taxed for municipal purposes; on the other hand, in *Attorney-General of Canada v. Toronto* (x) the Dominion government was held liable to pay water rates as being the price charged for a commodity furnished.

## IX.—MISCELLANEOUS PROVISIONS.

### *General.*

As to Legislative Councils of Provinces becoming Senators.

**127.** If any person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a place in the Senate is offered, does not within thirty days thereafter, by writing under his hand addressed to the Governor-General of the Province of Canada or to the Lieutenant-Governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this Act a member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the Senate shall thereby vacate his seat in such Legislative Council.

Oath of allegiance, &c.

**128.** Every member of the Senate or House of Commons of Canada shall before taking his seat therein take and subscribe before the Governor-General or some person authorized by him, and every member of a Legislative Council or Legis-

lative Assembly of any Province shall before taking his seat therein take and subscribe before the Lieutenant-Governor of the Province or some person authorized by him, the oath of allegiance contained in the fifth Schedule to this Act; and every member of the Senate of Canada and every member of the Legislative Council of Quebec shall also, before taking his seat therein, take and subscribe before the Governor-General, or some person authorized by him, the declaration of qualification contained in the same Schedule.

#### THE FIFTH SCHEDULE.

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##### OATH OF ALLEGIANCE.

I, *A. B.* do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

*Note.*—The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time, with proper terms of reference thereto.

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##### DECLARATION OF QUALIFICATION.

I, *A. B.* do declare and testify, That I am by law duly qualified to be appointed a member of the Senate of Canada [*or as the case may be*], and that I am legally or equitably seised as of freehold for my own use and benefit of lands and tenements held in free and common socage [*or seised or possessed for my own use and benefit of lands or tenements held in franc-alieu or in roture*

(*or as the case may be*),] in the province of Nova Scotia [*or as the case may be*] of the value of four thousand dollars over and above all rents, dues, debts, mortgages, charges, and incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements or any part thereof for the purpose of enabling me to become a member of the Senate of Canada [*or as the case may be*], and that my real and personal property are together worth four thousand dollars over and above my debts and liabilities.

Continuance  
of existing  
Laws, Courts,  
Officers, &c.

**129.** Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

We have already had such frequent occasion to refer to this section (*y*), that we need here only sum up what has

(*y*) See particularly p. 49, *et seq*, and p. 200.

been already said and refer to some of the more important decisions which deal with the question of its construction and effect.

The legislative bodies which were, after the Union, to make law for the Dominion and for the respective provinces have their "constitution" and powers provided for in other sections of the Act. The different spheres of authority are defined. But, apart from these necessary provisions, account had to be taken of the body of laws and legal institutions—the executive staff, administrative and judicial—existing in the provinces at the Union, and this is done by the section in question.

The whole body of laws—common law and statutory enactments—was continued, but with a clear line of division drawn through it by this section. Any alteration of that law, any Act in amendment of it, can now be enacted only by that legislature which, if the law which it is desired to repeal or alter were non-existent, could now enact it. As an example of the application of this rule to provisions of the common law in force in any province at the date of Confederation we may refer to the decision of the Supreme Court of Canada in Queddy River Boom Co. v. Davidson (z), in which a provincial Act was held inoperative to authorize the obstruction of a navigable river. The cases in reference to the amendment or repeal of provincial Acts of date prior to 1867 are numerous. We have from time to time referred to many of them. Dobie v. Temporalities Board (a), is the leading case. Upon the secularization of the "Clergy Reserves," a statutory commutation of the claims of the then Presbyterian clergy upon the revenues derivable from these "Reserves" was effected, and by an Act of the province of Canada a Board was incorporated for the management of the fund so created. After Confederation, in contempla-

(z) 10 S. C. R. 222; see *ante*, p. 383.

(a) 7 App. Cas. 136; see *ante*, p. 319.



tion of the union of the various Presbyterian bodies throughout Canada, the Quebec legislature passed an Act (38 Vic. c. 64), providing for the future disposal of this fund in the event of the union taking place. Somewhat similar legislation had taken place in Ontario (*b*). In the view of the Committee, the corporation and the corporate funds were not capable of division according to the limits of provincial authority, and the Quebec Act was therefore held invalid:

“The Act of the parliament of the province of Canada was, after the passing of the B. N. A. Act, 1867, continued in force within the provinces of Ontario and Quebec by virtue of section 129 of the latter statute. . . . The powers conferred by this section upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order, therefore, to ascertain how far the provincial legislature of Quebec had power to alter and amend the Act of 1858, incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sections 91 and 92 of the B. N. A. Act, which enumerate and define the various matters which are within the exclusive legislative authority of the parliament of Canada, as well as those in relation to which the legislatures of the respective provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject, the legislature of Quebec would have been authorized by section 92 to pass an Act identical in its terms with the Act of 1858, then it would follow that that Act has been validly amended by the 38 Vic. c. 64. On the other hand, if the legislature of Quebec has not derived such power of enactment from section 92, the necessary inference is that the legislative authority required in terms of section 129 to sustain its right to repeal or alter an old law of the parliament of the province of Canada is in this case wanting.”

(*b*) See *Cowan v. Wright*, 23 Grant 616.

Upon an examination of the Act of 1858, the Committee was of opinion that it could not have been validly passed by the Quebec legislature and could not therefore after the Union be altered or amended by provincial legislation (c).

In reference to the continuation of existing courts we need add nothing to what was said in chapter XI. (d), beyond drawing attention to the fact that the determination of the line between "the authority of the parliament or of that legislature under this Act" in relation to courts, their organization and procedure, is one of the most difficult tasks set by the B. N. A. Act.

In reference to the executive staff, this section should be read in connection with sections 130 and 131, and (as to Ontario and Quebec) 134 and 135. We need here do no more than refer to previous pages on which the question is discussed (e).

**130.** Until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, respon-

Transfer  
of officers to  
Canada.

(c) See also *Willet v. DeGrosbois* (*ante*, p. 285); *Noel v. Richmond* (*ante*, p. 362); *Cooley v. Brome* (*ante*, p. 361); *Hart v. Mississquoi* (*ante*, p. 361); *Munn v. McCannell*, 2 P. E. R. 148; *Keefe v. McLennan*, 2 Russ. & Ches. 5; 2 Cart. 400; *Reed v. Mousseau*, 8 S. C. R. 408; *Peak v. Shields*, 6 O. A. R. 639. Note also s. 137, *post*.

(d) *Ante*, p. 227, *et seq.* See also notes to s. 91, s-s. 27, s. 92, s-s. 14, and s. 101.

(e) *Ante*, p. 49, *et seq.*; *Reg. v. Reno*, 4 P. R. (Ont.) 294.

sibilities, and penalties as if the Union had not been made.

In *Regina v. Horner* (*f*), Mr. Justice Ramsay, delivering the judgment of the Court of Queen's Bench of Quebec, says :

"In saying they are federal officers, the statute must be understood *quoad* their federal duties, for the parliament of Canada could not legislate for their local duties."

Appointment  
of new officers

**131.** Until the Parliament of Canada otherwise provides, the Governor-General in Council may from time to time appoint such officers as the Governor-General in Council deems necessary or proper for the effectual execution of this Act.

Treaty obliga-  
tions.

**132.** The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

In *Ex parte Worms*, before Chief Justice Dorion (*z*), it was argued that the Imperial Extradition Act of 1870 could not apply to Canada, because of the express power conveyed by this section. The Chief Justice however held that the two provisions are in no way inconsistent, and that, if they were, the Extradition Act, being an Imperial Act of later date, must govern in all matters relating to the extradition of fugitive criminals. The overruling legisla-

(*f*) 2 Steph. Dig. 450; 2 Cart. 317. See *ante*, p. 470.

(*z*) 22 L. C. Jur. 109; 2 Cart. 315. See also *In re Williams*, 7 P. R. (Ont.) 275.

tion of the Imperial parliament prevents us from utilizing the power conferred by this section.

While we may legislate in aid of British treaties affecting us, we have as yet no power to make treaties with foreign countries (*a*).

**133.** Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

Use of English  
and French  
languages.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

### *Ontario and Quebec.*

**134.** Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following officers, to hold office during pleasure, that is to say—the Attorney-General, the Secretary

Appointment  
of executive  
officers for  
Ontario and  
Quebec.

(*a*) See Todd, "Parl. Govt. Brit. Col.," 192.



and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the case of Quebec the Solicitor-General; and may, by order of the Lieutenant-Governor in Council, from time to time prescribe the duties of those officers and of the several departments over which they shall preside, or to which they shall belong, and of the officers and clerks thereof; and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

Powers, duties, &c., of executive officers.

**135.** Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to

this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the duties and functions of the office of Minister of Agriculture at the passing of this Act imposed by the law of the Province of Canada, as well as those of the Commissioner of Public Works.

**136.** Until altered by the Lieutenant-Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada. Great Seal.

**137.** The words “and from thence to the end of the then next ensuing Session of the Legislature,” or words to the same effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada, if the subject matter of the Act is within the powers of the same, as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the subject matter of the Act is within the Construction  
of temporary  
Acts.

powers of the same as defined by this Act.

As to errors  
in names.

**138.** From and after the Union, the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any deed, writ, process, pleading, document, matter, or thing, shall not invalidate the same.

As to issue of  
Proclama-  
tions before  
Union to com-  
mence after  
Union.

**139.** Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed shall be and continue of like force and effect as if the Union had not been made.

As to issue of  
Proclama-  
tions after  
Union.

**140.** Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is now issued before the Union, may be issued by the Lieutenant-Governor of Ontario, or of Quebec, as its subject matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation the same and the several matters and things therein pro-

claimed shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

**141.** The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and Quebec. Penitentiary.

**142.** The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitration of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec. Arbitration  
respecting  
debts, &c. (i).

(i) See *In re Arbitration between Ontario and Quebec* (b)

**143.** The Governor-General in Council may from time to time order that such and so many of the records, books, and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Division of  
records.



property of that Province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof shall be admitted as evidence.

Constitution  
of townships  
in Quebec.

**144.** The Lieutenant-Governor of Quebec may from time to time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute townships in those parts of the Province of Quebec in which townships are not then already constituted, and fix the metes and bounds thereof.

#### X.—INTERCOLONIAL RAILWAY.

Duty of Gov-  
ernment and  
Parliament of  
Canada to  
make railway  
herein de-  
scribed.

**145.** Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial Railway is essential to the consolidation of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that agreement, it shall be the duty of the Government and Parliament of Canada to provide for the commencement within six months after the

Union, of a railway connecting the River St. Lawrence with City of Halifax in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practicable speed.

#### XI.—ADMISSION OF OTHER COLONIES (i).

**146.** It shall be lawful for the Queen, Power to admit Newfoundland, &c., into the Union. by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament in Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

| (i) See Part IV, *post*.

As to representation of Newfoundland and Prince Edward Island in Senate.

**147.** In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a representation in the Senate of Canada of four members, and (notwithstanding anything in this Act) in case of the admission of Newfoundland the normal number of Senators shall be seventy-six and their maximum number shall be eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the Senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those Provinces shall not be increased at any time beyond ten, except under the provisions of this Act for the appointment of three or six additional Senators under the direction of the Queen.

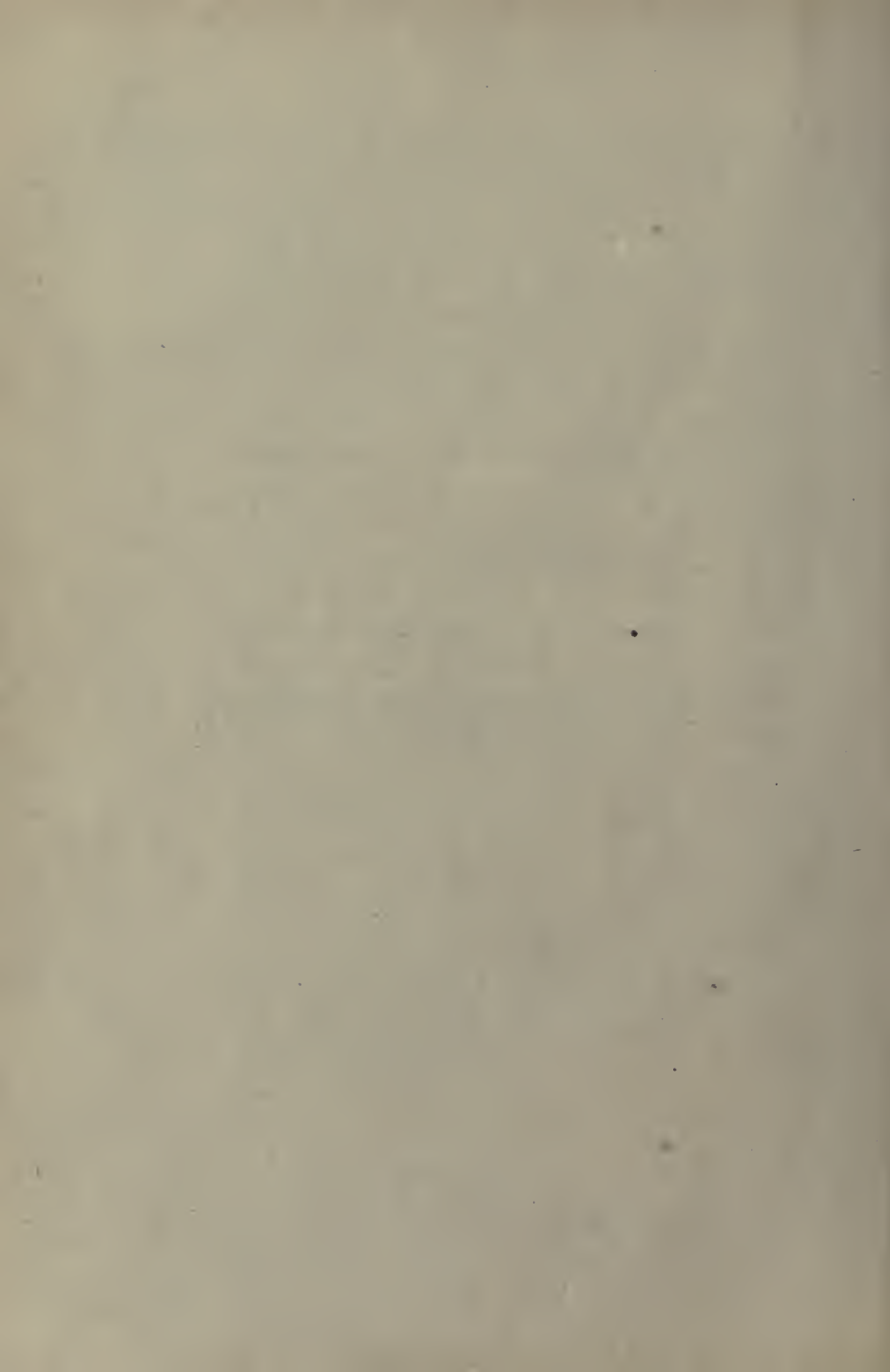
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PART IV.

SUBSEQUENT GROWTH.

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## CHAPTER XIII.

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### THE NORTH-WEST TERRITORIES.

The future extension of the Dominion of Canada, so as ultimately to embrace the whole of British North America from ocean to ocean, was anticipated, as appears by sections 146 and 147 of the B. N. A. Act, 1867. We need here draw attention to the former section only (*a*), by which provision was made for the admission of the other British territories, organized and unorganized. The important point to be noted is that by virtue of the last clause of this section, the various orders in council subsequently promulgated effecting the admission to the Union of Rupert's Land and the North-western Territory, and of British Columbia and Prince Edward Island are, in effect, Imperial Acts, and are, to those new portions of the Dominion, their constitutional charters, amended, however, in certain particulars by subsequent Imperial legislation.

The Dominion government lost no time in setting to work to secure control of the vast territories lying between Ontario and British Columbia. At the very first session of the parliament of Canada, an address (*b*) was passed by both Houses representing the expediency, both from a Canadian and an Imperial point of view, of an early extension of the Dominion to the shores of the Pacific. This address pointed out the necessity for a "stable government" and the estab-

(*a*) See *ante*, p. 545.

(*b*) See Dom. Stat. 1872, p. lxiii., *et seq.*

lishment of institutions analogous to those of the older provinces, in order to the development of the agricultural, mineral, and commercial resources of the Great Lone Land, and prayed that Her Majesty might be pleased (pursuant to section 146 of the B. N. A. Act) "to unite Rupert's Land and the North-Western Territory with this Dominion, and to grant to the parliament of Canada authority to legislate for their future welfare and good government."

That part of these territories (c) known as Rupert's Land had been under the control of the Hudson's Bay Company ever since, in 1670, King Charles II. granted his charter to those "adventurers trading into Hudson's Bay," and as lords-proprietors they had full right of government and administration therein subject to the sovereignty of England. The boundaries of Rupert's Land were never accurately determined. Speaking roughly, the country known by that name comprised the territory watered by streams flowing into Hudson's Bay; but the company had extended their operations and assumed jurisdiction (d) over other parts of the North-Western Territory. We note this distinction between the North-Western Territory proper and Rupert's Land, because, as we shall see, the authority of the Dominion parliament to legislate for these two portions respectively of this great country flowed, in the first instance, from different Imperial Acts.

The existence of the Hudson Bay Company's charter rendered it necessary, in the view of the home government, that terms should first be settled with that company for a surrender of "all the rights of government" and other rights, privileges, etc., in Rupert's Land enjoyed by the company under their charter, other than their trading and commercial privileges. To this end, the Rupert's Land Act,

(c) See a very interesting article in *Western Law Times*, Vol. I., June, 1890, which contains in brief an account of the early organization of these territories under the H. B. Co.

(d) See *post*.

1868, was passed by the Imperial parliament, empowering Her Majesty to accept such surrender on terms to be agreed upon—"subject to the approval of Her Majesty in council of the terms and conditions to be proposed by the Dominion parliament for the admission of Rupert's Land and embodied in an address." The 5th section of this Act provides:

"5. It shall be competent to Her Majesty by any such order or orders in council as aforesaid on address from the Houses of the parliament of Canada to declare that Rupert's Land shall from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada; and thereupon it shall be lawful for the parliament of Canada from the date aforesaid to make, ordain, and establish within the land and territory so admitted as aforesaid all such laws, institutions, and ordinances, and to constitute such courts and officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein; provided that until otherwise enacted by the said parliament of Canada all the powers, authorities and jurisdiction of the several courts of justice now established in Rupert's Land and of the several officers thereof and of all magistrates and justices now acting within the said limits shall continue in full force and effect therein."

This Act, it will be noticed, is confined to Rupert's Land, but, under the terms agreed upon by the Hudson Bay Company and the Canadian delegates, the company surrendered all their rights of government and other rights, privileges, etc., etc., not only in Rupert's Land but also in any other part of British North America (other than Canada and British Columbia) and all lands and territories therein, save some 50,000 acres reserved to them by the agreement. We need not refer further to the terms of surrender as embodied in the Imperial order in council finally passed, because those terms were simply the price paid by the Dominion for the surrender, and do not in any way touch our subject. The order in council—23rd June, 1870—which finally admitted Rupert's Land and the North-Western Territory to the



Union provided that from and after the 15th day of July, 1870, those vast areas should form part of Canada, and that as to the North-Western Territory "the parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government" thereof; but it made no further provision as to legislation for Rupert's Land, because that was provided for by the section of the Rupert's Land Act, 1868, which we have already quoted. As to the North-Western Territory proper, therefore, the legislative power was conferred by the order in council operating as an Imperial Act by virtue of section 146 of the B. N. A. Act; while as to Rupert's Land the legislative power was conferred by the Rupert's Land Act, 1868. Nothing, however, turns upon this distinction, for, as we shall see, after the province of Manitoba was formed, full legislative power was given to the parliament of Canada over all territories not included within the boundaries of any province, so that any possible distinction which might have been urged as arising from the difference in the phraseology of the two earlier enactments is entirely obliterated.

Anticipating the admission of these territories, the Dominion parliament in 1869 passed "An Act for the temporary government of Rupert's Land and the North-Western Territory, when united with Canada" (32-33 Vic. c. 3), providing for the appointment of a Lieutenant-Governor to administer the government of these territories under instructions from the Governor-General in Council and that by Order in Council the Lieutenant-Governor might be empowered (subject to such conditions and restrictions as might be imposed by such Order in Council), "to make provision for the administration of justice therein, and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Her Majesty's subjects and others therein." The Lieutenant-Governor was to

be aided by a Council, not exceeding fifteen, nor less than seven persons, to be appointed by the Governor-General in Council. The powers of this Council were to be from time to time as defined by Order in Council, *i.e.*, by the Dominion government. By the 5th and 6th sections of this Act it was provided :

“5. All the laws in force in Rupert's Land and the North-Western Territory at the time of their admission to the Union shall so far as they are consistent with “the British North America Act, 1867,”—with the terms and conditions of such admission approved of by the Queen under the 146th section thereof—and with this Act—remain in force until altered by the parliament of Canada, or by the Lieutenant-Governor under the authority of this Act.

“6. All public officers and functionaries holding office in Rupert's Land and the North-Western Territory at the time of their admission into the Union, excepting the public officer or functionary at the head of the administration of affairs, shall continue to be public officers and functionaries of the North-West Territories with the same duties and powers as before, until otherwise ordered by the Lieutenant-Governor under the authority of this Act.”

to which clauses we shall shortly have occasion again to refer.

Again, in 1870 (the admission not having yet taken place) the parliament of Canada passed “An Act to amend and continue the Act 32-33 Vic. c. 3; and to establish and provide for the government of the province of Manitoba”—33 Vic. c. 3. The provisions of this Act as to Manitoba will be dealt with later. As to the remaining portions of the territories about to become part of the Dominion, the only amendment of the Act of the previous session was in the provision that the Lieutenant-Governor of Manitoba should also be commissioned as Lieutenant-Governor of the North-West Territories—as such remaining portions were now to be called. With this amendment the Act of 1869 was continued to the end of the session of 1871.

Confining our attention, then, to the North-West Territories; when next the parliament of Canada met, these territories were part of the Dominion, and much of the legislation of that session applied to them equally with the other parts of Canada. From that time to the present the Dominion parliament has had the power to legislate for the North-West Territories in reference to all matters within the ken of a colonial legislature (e); and although large powers of local self-government have been conceded to the inhabitants of these Territories they are held at the will of the parliament of Canada. To what extent that parliament will interpose in reference to matters over which legislative power has been conferred on the North-West assembly, depends on "conventions" not capable of accurate definition. No doubt before very long a new province or provinces will be formed out of these territories. The position, therefore, is so evidently temporary that we feel some difficulty in deciding to what extent of detail we should go in discussing the present position of the North-West Territories. What we write will in all probability be in a very short time of historical interest merely. Present usefulness therefore must be our guide, leaving the future to take care of itself. Because, however, cases may arise in which the rights of litigants will depend on the law as it stood at some particular time since 1870, we deem it advisable before discussing the Acts which are to-day the constitutional charters of the North-West Territories, to state shortly the changes which have been made from time to time up to the present, in order that the proper sources of legislation at any given period, and in relation to any given matter, may be consulted.

On the 15th of July, 1870, these Territories became part of Canada. The Acts of the two previous sessions expiring at the end of the session of 1871, a permanent Act was passed (34 Vic. c. 16), containing the same provisions as had

(e) See chapter IX., *ante*.

been made by those Acts. We should note here the B. N. A. Act, 1871 (34-35 Vic. c. 28), which will be printed in full when we come to deal with Manitoba. So far as concerns the North-West Territories, it merely validated the previous Canadian legislation (32-33 Vic. c. 3, and 33 Vic. c. 3), and made the general provision above noted that "the parliament of Canada may from time to time make provision for the administration, peace, order, and good government (f) of any territory not for the time being included in any territory."

*Period from 15 July, 1870, to 1 November, 1873.*

During this period, then, legislative authority over the North-West Territories was exercised or exerciseable—in the order of efficacy—

(a) By the Imperial Parliament :

(b) By the Parliament of Canada :

(c) By the Lieutenant-Governor of Manitoba in relation only to such matters as were designated by order of the Governor-General in Council. By 36 Vic. c. 5, the number of the council of the North-West Territories was increased to a maximum of 21, instead of 15, the minimum remaining at 7. Nothing, however, was done toward the government, by local authority, of the North-West Territories until December, 1872, when Lieutenant-Governor Morris of Manitoba was commissioned to act as Lieutenant-Governor of these Territories, with a council of eleven members to aid him in the administration of affairs there. By Order in Council of date 12th February, 1873, it was ordered:

"1. That the Lieutenant-Governor of the North-West Territories, *by and with the advice of the said Council* shall be, and he is hereby authorized to make provision for the administration of justice in the said territories, and generally to make and establish such ordinances as may be necessary for the peace, order, and good government of the said North-West Territories and of Her

(f) See *Riel v. Regina*, 10 App. Cas. 675, fully noted, *ante*, p. 347.



Majesty's subjects and others therein. Provided, first, that no such ordinance shall deal with or affect any subjects which are beyond the jurisdiction of a provincial legislature, under the 'British North America Act, 1867,' and provided, second, that all such ordinances shall be made to come into force only after they have been approved by the Governor-General in Council, unless in case of urgency, and in that case the urgency shall be stated on the face of the ordinance."

with further provision for the transmission of all ordinances to the Governor-General, who should be at liberty to disallow any of them at any time within two years from their passage.

*Period from 1 November, 1873, to 7 October, 1876.*

On the 1st of November, 1873, the Act 36 Vic. c. 34, came into force. It provided—probably to remove doubts—that the local legislation on the various subjects which by Order in Council to that date had been committed to the legislative ken of the Lieutenant-Governor and his Council, should thereafter be passed by the Lieutenant-Governor, *by and with the advice and consent* of the Council. In relation to all matters not so committed, legislative power was by the Act conferred on the Governor-General in Council. The legislative power of both the Dominion cabinet and the Lieutenant-Governor in Council—each within its respective sphere—might be exercised in the way of extending to the Territories general Acts of the parliament of Canada with such modification as might be thought desirable, or in the way of repealing such general Acts so far as they might apply to the territories; with this proviso, however, that no law to be passed by either of these bodies should (1) be inconsistent with any Act of the parliament of Canada of express application to the Territories; (2) alter the punishment provided for any crime or the legal description or character of the crime itself; (3) impose any tax or any duty of customs or excise or any penalty exceeding one hundred

dollars; or (4) appropriate any monies or property of the Dominion without the authority of the Dominion parliament. All local legislation was to be subject to disallowance within two years after its passage.

During this period, therefore, legislative power was exercisable—in the order of its efficacy—

(a) By the Imperial Parliament:

(b) By the Parliament of Canada:

(c) By the Governor-General in Council in relation to all matters not committed to the Lieutenant-Governor and his Council; which in reality placed the entire legislative power (subject to the foregoing) in the hands of the Dominion government, if it had chosen to exercise it, for the powers of the Lieutenant-Governor were themselves defined by the Order in Council to which we have referred, and could of course be at any time curtailed:

(d) By the Lieutenant-Governor in Council in relation to all matters from time to time committed to them for legislative action.

During this period, however, no further Orders in Council were passed relative to the powers of the Lieutenant-Governor in Council, nor was the legislative power of the Governor-General in Council exercised, so that this and the earlier period are practically one. Dominion legislation of a general character passed during this period would *prima facie* apply to the North-West Territories, and in addition we may note 36 Vic. c. 35, which made special provision for the administration of justice therein.

*Period from 7<sup>th</sup> October, 1876, to 28 April, 1877.*

In 1875 was passed "The North-West Territories Act, 1875," which came into force, however, only on the 7th of October, 1876. It amended and consolidated previous legislation, and under it the first resident Lieutenant-Governor was appointed, and the first legislative session took

place in the Territories. The Council was reduced in number—so far as appointed members were concerned—to five persons, with powers as defined in the Act, and with such further powers not inconsistent therewith as might from time to time be conferred by Order in Council. As, however, the section of the Act defining the legislative powers of the Lieutenant-Governor in Council (*g*), was in force for only some six months, and as a reference to the ordinances passed at the session held while it was so in force discloses that nothing was done in the way of legislation which was not fully justified by the powers conferred by the Act, we have not thought it necessary to quote the section. By the 6th section of this Act all laws and ordinances then in force in the Territories were to continue until altered or repealed by competent authority. The Governor-General in Council was empowered (*h*) to apply any Act, or part of any Act of the Dominion parliament to the Territories generally or to any part thereof. The Lieutenant-Governor was empowered to establish, as population increased, electoral districts, and it was provided that so soon as the number of elected members of the Council should reach 21, the Council should cease to exist and a Legislative Assembly take its place. In the electoral districts the Lieutenant-Governor in Council might impose direct taxation and license fees for raising a revenue for the local and municipal purposes of each district. Power was also given to establish municipalities in the electoral districts, with powers of municipal taxation to be prescribed by ordinance of the Lieutenant-Governor in Council. In reference to education, it was provided that any legislation upon the subject should be subject to the right of the minority in any district, whether Protestant or Roman Catholic, to establish separate schools, the supporters of which should be exempt from taxation for the support of the schools estab-

(*g*) 38 Vic. c. 49, s. 7; repealed by 40 Vic. c. 7.

(*h*) Sec. 8.

lished by the majority. The Act also contained much legislation upon such general topics as real estate and its descent, wills, married women, registration of deeds, etc. Provision was made for the administration of justice through the medium of local courts presided over by stipendiary magistrates, who in more serious criminal cases were to be associated with the chief justice or one of the judges of the Court of Queen's Bench of Manitoba. In capital cases an appeal lay to the full Court of Queen's Bench of that province.

*Period from 28 April, 1877, to R. S. C. (1886).*

The North-West Territories Act, 1875, was, as we have intimated, amended in a most important particular by 40 Vic. c. 7, passed about six months after the Act of 1875 came into operation. The section defining the legislative powers of the Lieutenant-Governor in Council was repealed and the following section substituted therefor:

“7. The Lieutenant-Governor in Council, or the Lieutenant-Governor by and with the advice and consent of the Legislative Assembly, as the case may be, shall have such powers to make ordinances for the Government of the North-West Territories as the Governor in Council may, from time to time confer upon him; Provided always that such powers shall not at any time be in excess of those conferred by the ninety-second section of ‘The British North America Act, 1867,’ upon the Legislatures of the several Provinces of the Dominion:

“2. Provided that no ordinance to be so made shall,—(1) be inconsistent with or alter or repeal any provision of any Act of the Parliament of Canada in Schedule B. of this Act, or of any Act of the parliament of Canada, which may now, or at any time hereafter, expressly refer to the said Territories or which or any part of which may be at any time made by the Governor in Council, applicable to or declared to be in force, in the said Territories, or,—(2) impose any fine or penalty exceeding one hundred dollars:

“3. And provided that a copy of every such ordinance shall be mailed for transmission to the Secretary of State, within ten



days after its passing, and it may be disallowed by the Governor in Council at any time within two years after its receipt by the Secretary of State ; Provided, also, that all ordinances so made, and all Orders in Council disallowing any ordinances so made, shall be laid before both Houses of Parliament, as soon as conveniently may be after the making and enactment thereof respectively."

On the 11th of May, 1877, an Order in Council was passed which, after reciting the statutes of 1875 and 1877, ran thus :

Now, in pursuance of the powers by the said statute conferred, his Excellency, by and with the advice of the Privy Council, has been pleased further to order, and it is hereby ordered, that the Lieutenant-Governor in Council shall be and he is hereby empowered to make ordinances in relation to the following subjects, that is to say :

1. The establishment and tenure of territorial offices, and the appointment and payment of territorial officers ;

2. The establishment, maintenance and management of prisons in and for the North-West Territories ;

3. The establishment of municipal institutions in the Territories, in accordance with the provisions of the "North-West Territories Acts, 1875 and 1877 " (i) ;

4. The issue of shop, auctioneer and other licenses, in order to the raising of a revenue for territorial or municipal purposes (i) ;

5. The solemnization of marriage in the Territories ;

6. The administration of justice, including the constitution, organization and maintenance of territorial courts of civil jurisdiction ;

7. The imposition of punishment by fine, penalty or imprisonment for enforcing any territorial ordinance ;

8. Property and civil rights in the Territories, subject to any legislation by the parliament of Canada upon these subjects, and—

(i) Somewhat amended in 1883 ; see *post*.

9. Generally on matters of a merely local or private nature in the Territories.

These Acts were from time to time amended, consolidated and revised, as we shall indicate, but, substantially, the legislative power of the Lieutenant-Governor in Council continued to be governed by the above section and the Order in Council we have quoted until 1888—indeed, we may say, until 1891, for, upon the establishment of a legislative assembly in the former year, its powers of legislation were not increased beyond those exerciseable before its creation by the Lieutenant-Governor in Council.

In 1880, by 43 Vic. c. 25, previous Acts were amended and consolidated. The time for disallowing territorial ordinances was shortened to one year, and the clauses of the Act of 1875 relating to municipalities eliminated, being deemed, no doubt, to be covered by the Order in Council above quoted (*j*). The participation of Manitoba judges in the administration of justice in the Territories was abolished except in the matter of appeals in capital cases.

We may mention also 47 Vic. c. 23, and 48-49 Vic. c. 51, making amendments of details not material to be further noted here.

On June 26th, 1883, a new Order in Council was promulgated defining the powers of the Lieutenant-Governor, whether acting in Council or by and with the advice and consent of the legislative assembly (*k*); the only amendment, however, of the Order in Council of 1877 above quoted being in items 3 and 4, which were made to read as follows:

“3. Municipal Institutions in the Territories, subject to any legislation by the Parliament of Canada heretofore or hereafter enacted:

“4. The issue of shop, auctioneer, and other licenses, except

(*j*) See 45 Vic. c. 28, and 47 Vic. c. 23, s. 10.

(*k*) No assembly was constituted until 1888; see *post*.

licenses for the sale of intoxicating liquors, in order to the raising of a revenue for territorial or municipal purposes."

In 1886, important legislation was enacted (49 Vic. c. 25), but as it was carried at once into the Revised Statutes of that year we need not stay to consider its provisions (*l*).

At the present time the position of these territories is defined by "The North-West Territories Act" (R. S. C. c. 50), and amendments thereto as follows :

A. D. 1886.      An Act respecting the North-West Territories.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada enacts as follows:—

#### SHORT TITLE.

Short title.      1. This Act may be cited as "*The North-West Territories Act*."

#### INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

Interpretation "Territories."      (a) The expression "Territories" means the North-West Territories, as defined in this Act;

"Lieutenant-Governor."      (b) The expression "The Lieutenant-Governor" means the Lieutenant-Governor of the North-West Territories;

"Lieutenant-Governor in Council."      (c) The expression "Lieutenant-Governor in Council" means the Lieutenant-Governor of the Territories in Council, or the Lieutenant-Governor by and with the advice and consent of the Legislative Assembly of the Territories, as the case may be;

(*l*) It was proclaimed 18th February, 1887; the R. S. O. took effect 1st March, 1887.

(d) The expression "Supreme Court" means <sup>"Supreme Court."</sup> the Supreme Court of the North-West Territories.

*[(e) and (f) define "intoxicating liquor" and "intoxicant." It is not thought necessary to print the sections dealing with that subject. Only those parts of the Act which may be reasonably considered of constitutional importance are here inserted.]*

#### GOVERNMENT AND LEGISLATION.

**3.** The Territories formerly known as "Rupert's Land" and the North-West Territory shall, with the exception of such portions thereof as form the Province of Manitoba and the District of Keewatin (*m*), continue to be called and known as the North-West Territories. <sup>Territories defined.</sup>

**4.** There shall be for the Territories, an officer called the Lieutenant-Governor, appointed by the Governor in Council, by instrument under the Great Seal of Canada, who shall hold office during pleasure: <sup>Lieutenant-Governor.</sup>

**2.** The Lieutenant-Governor shall administer <sup>His powers</sup> the Government, under instructions, from time to time, given him by the Governor in Council, or by the Secretary of State of Canada.

**5.** The Governor in Council may, from time <sup>Administrator</sup> to time, appoint an Administrator to execute the office and functions of the Lieutenant-Governor during his absence, illness or other inability.

**6.** Every Lieutenant-Governor or Administrator so appointed shall, before assuming the duties of his office, take and subscribe, before the Governor-General, or before some person duly <sup>Oaths to be taken.</sup>

(*m*) Keewatin is in a still more embryonic state, and it is not thought necessary to deal with it here. See R. S. C. c. 53.



authorized to administer such oaths, an oath of allegiance and an oath of office similar to those required to be taken by a Lieutenant-Governor under "*The British North America Act, 1867.*"

*[Sections 7 and 8 were repealed by 51 Vic. c. 19, s. 1, and provision made for a Legislative Assembly (section 2). This latter section was itself repealed by 54-55 Vic. c. 22, the provision now standing:]*

Legislative  
Assembly.

**2.** There shall be a Legislative Assembly for the Territories, which shall be composed of twenty-six members elected to represent the electoral districts set forth in the schedule (*n*) to this Act.

Electoral  
districts,

2. The Assembly shall have power to alter the boundaries of the electoral districts from time to time.—54-55 Vic. c. 22, s. 2.

Duration of  
the Assembly.

**3.** Every Legislative Assembly shall continue for three years from the date of the return of the writs for choosing the same; but the Lieutenant-Governor may, at any time, dissolve the Assembly and cause a new one to be chosen.—54-55 Vic. c. 22, s. 3.

Limit of time  
for session.

**4.** There shall be a session of the Legislative Assembly convened by the Lieutenant-Governor at least once in every year, so that twelve months shall not intervene between the last sitting of the Assembly in one session and its first sitting in another session; and such Assembly shall sit separately from the Lieutenant-Governor, and shall present Bills passed by it to the Lieutenant-Governor for his assent, who may approve or reserve the same for the assent of the Governor-General.—54-55 Vic. c. 22, s. 4.]

Proceedings  
on bills.

*[With respect to elections provision is made by 51 Vic. c. 19, amended to some extent by 54-55 Vic. c. 22. We indicate after each section by what Act enacted:]*

**5.** Until the Legislature of the North-West Territories otherwise provides, as it may do, the law in force therein at the time of the passing of this Act relating to the election of members of the Council of the North-West Territories shall, subject to the provisions of this Act, apply to the election of members of the Legislative Assembly.—51 Vic. c. 19, s. 5.

Proceedings  
at elections.

**6.** Whenever it is necessary to call a new Legislative Assembly, or whenever a vacancy occurs by reason of death, resignation, or otherwise, of an elected member, the Lieutenant-Governor shall cause a writ or writs of election, as the case may be, to be issued by the Clerk of the Legislative Assembly, in such form and addressed to such returning officer or officers as he approves of until otherwise provided by the Assembly:

Issue of writs  
for elections.

**2.** Until the Legislative Assembly otherwise provides, the Lieutenant-Governor shall, by proclamation, prescribe and declare, for use at all or any elections, rules for—

Rules for  
elections.

- (a) The mode of providing voters' lists;
- (b) The oaths to be taken by voters;
- (c) The appointment, powers and duties of returning and deputy returning officers, election and poll clerks and their oaths of office;
- (d) The proceedings to be observed at elections;
- (e) The periods during which such elections may be continued;

(f) Such other provisions with respect to such elections as he thinks fit.—54-55 Vic. c. 22, s. 5.

Who may  
vote.

7. The persons qualified to vote at an election for the Legislative Assembly shall be the male British subjects by birth or naturalization (other than unenfranchised Indians), who have attained the full age of twenty-one years, who have resided in the North-West Territories for at least the twelve months, and in the electoral district for at least the three months respectively, immediately preceding the time of voting.—51 Vic. c. 19, s. 7.

Who eligible  
for election.

8. Any British subject by birth or naturalization shall be eligible for nomination and election.

Deposit at  
nomination.

2. No nomination at any election shall be valid and acted upon unless at or before the time of nomination a sum of one hundred dollars is deposited in the hands of the returning officer; and the receipt of the returning officer shall in every case be sufficient evidence of the payment herein mentioned:

How applied.

3. The sum so deposited shall be returned to the person by whom the deposit was made in the event of the candidate, by or on whose behalf it was so deposited, being elected, or of his obtaining a number of votes at least equal to one-half the number of votes polled in favor of the candidate elected, otherwise it shall belong to Her Majesty for the public uses of the Territories; and the sum so paid and not returned as herein provided shall be applied by the returning officer towards the payment of the election expenses, and an account thereof shall be ren-

dered by him to the Lieutenant-Governor.—  
51 Vic. c. 19, s. 8.

9. Elected members of the Legislative Assembly shall take and subscribe before the Lieutenant-Governor or before such person as is designated by the Governor in Council, the following oath of allegiance:—

Oath to be  
taken by  
members.

“I, A. B., do swear that I will be faithful and bear true allegiance to Her Majesty, her heirs and successors.”—51 Vic. c. 19, s. 9.

10. A majority of the members of the Legislative Assembly, including the members appointed by the Governor in Council, shall form a quorum for the transaction of business.—51 Vic. c. 19, s. 10.

Quo

11. The Legislative Assembly, on its first assembling after a general election, shall proceed with all practicable speed to elect one of its elected members to be Speaker:

Election of  
Speaker.

2. In case of a vacancy happening in the office of Speaker by death, resignation or otherwise, the Legislative Assembly shall proceed with all practicable speed to elect another of its elected members to be Speaker:

Vacancy in  
office of  
Speaker.

3. The Speaker shall preside at all meetings of the Legislative Assembly:

Speaker to  
preside.

4. Until the Legislative Assembly otherwise provides, in case of the absence for any reason of the Speaker from the chair of the Assembly for forty-eight consecutive hours, the Assembly may elect another of its members to act as Speaker, and the member so elected shall, during the continuance of such absence of the Speaker, have and execute all the powers, privileges and duties of Speaker.—51 Vic. c. 19, s. 11.

Case of ab-  
sence pro-  
vided for.



Majority to decide.

**12.** Questions arising in the Legislative Assembly shall be decided by a majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a vote.—51 Vic. c. 19, s. 12.

Advisory Council to be appointed.

**13.** The Lieutenant-Governor shall select from among the elected members of the Legislative Assembly four persons to act as an advisory council on matters of finance, who shall severally hold office during pleasure; and the Lieutenant-Governor shall preside at all sittings of such advisory council and have a right to vote as a member thereof, and shall also have a casting vote in case of a tie.—51 Vic. c. 19, s. 13.

Money votes to be first recommended

**14.** The Legislative Assembly shall not adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost to any purpose that has not been first recommended to the Assembly by message of the Lieutenant-Governor in the session in which such vote, resolution, address or bill is proposed.—51 Vic. c. 19, s. 14.

Salary of Speaker.

**15.** The Speaker of the Legislative Assembly shall receive a salary of five hundred dollars per annum, payable out of the Consolidated Revenue Fund of Canada.—51 Vic. c. 19, s. 15.

Clerk of Assembly, his duties and salary.

**16.** The Governor-in-Council may appoint a clerk of the Legislative Assembly, who shall act as, and perform the duties of secretary to the Lieutenant-Governor, and who shall take before the Lieutenant-Governor the oath of allegiance, and such oath of office as the Governor-in-Council prescribes, and who shall receive a salary of two thousand dollars per annum, and such salary shall be paid out of the Consolidated Revenue Fund of Canada.—51 Vic. c. 19, s. 16.]

9. The seat of Government of the Territories <sup>Seat of Gov-  
ernment.</sup> shall be fixed, and may, from time to time, be changed by the Governor in Council.

[Section 10 made provision for the Lieut.-Governor presiding over and voting at meetings of the Council. See now 51 Vic. c. 19, s. 13; and 54-55 Vic. c. 22, s. 4, *supra*.]

11. Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

Laws of Eng-  
land on July  
15, 1870, in  
force in  
Territories  
with certain  
exceptions. (o).

12. All laws and ordinances in force in the Territories, and not repealed by or inconsistent with this Act, shall remain in force until it is otherwise ordered by the Parliament of Canada, by the Governor in Council, or by the Lieutenant-Governor in Council, under the authority of this Act.

Laws in force  
continued (o)

[Section 13, defining the powers of the Lieut.-Governor in Council was repealed by 54-55 Vic.

(o) For convenience we have collected the authorities upon the matters referred to in sections 11 and 12, and they will be found, *post*. In the Revised Statutes of Canada are a number of Acts specially dealing with different subjects of legislation as to the North-West Territories,—*e. g.*, “The N. W. T. Representation Act,” “The Territories Real Property Act,” “The Homestead Exemption Act,” “The Dominion Lands Act,” etc., etc.

*c. 22, s. 6, which substitutes therefor the following :*

Powers of  
Assembly.

**13.** The Legislative Assembly shall, subject to the provisions of this Act, or of any other Act of the Parliament of Canada, at any time in force in the Territories, have power to make ordinances for the government of the Territories in relation to the classes of subjects next hereinafter mentioned, that is to say :—

(1) The mode of providing voters' lists, the oaths to be taken by voters, the appointment, powers and duties of returning officers and deputy returning officers, election and poll clerks, and their oaths of office, the proceedings to be observed at elections, the periods during which such elections may be continued, and such other provisions with respect to such elections as may be thought fit;

(2) Direct taxation within the Territories in order to raise a revenue for territorial or municipal or local purposes ;

(3) The establishment and tenure of territorial offices, and the appointment and payment of territorial officers out of territorial revenues ;

(4) The establishment, maintenance, and management of prisons in and for the Territories,—the expense thereof being payable out of territorial revenues ;

(5) Municipal institutions in the Territories ;

(6) Shop, saloon, tavern, auctioneer and other licenses, in order to raise a revenue for territorial or municipal purposes ;

(7) The incorporation of companies with territorial objects, with the following exceptions :—

(a) Such companies as cannot be incorporated by a provincial legislature ;

(b) Railway, steamboat, canal, transportation, telegraph and irrigation companies ;

(c) Insurance companies ;

(8) The solemnization of marriage in the Territories ;

(9) Property and civil rights in the Territories ;

(10) The administration of justice in the Territories, including the constitution, organization, and maintenance of territorial courts of civil jurisdiction, including procedure therein ; but not including the power of appointing any judicial officers ;

(11) The imposition of punishment by fine, penalty, or imprisonment, for enforcing any territorial ordinances ;

(12) The expenditure of territorial funds and such portion of any moneys appropriated by Parliament for the Territories as the Lieutenant-Governor is authorized to expend by and with the advice of the Legislative Assembly or of any Committee thereof ;

(13) Generally, all matters of a merely local or private nature in the Territories :

2. Nothing in this section contained gives, or Limitation. shall be construed to give to the Legislative Assembly any greater powers with respect to the subjects therein mentioned than are given to Provincial Legislatures under the provisions of section 92 of "The British North America Act, 1867," with respect to the similar objects therein mentioned.]



Ordinances  
respecting  
education.  
Majority  
schools. (p)

Minority  
schools.

Declaratory  
as to ordinan-  
ces.

Ordinances  
respecting  
administra-  
tion of justice  
(q)

**14.** The Lieutenant-Governor in Council shall pass all necessary ordinances in respect to education; but it shall therein always be provided, that a majority of the ratepayers of any district or portion of the Territories, or of any less portion or subdivision thereof, by whatever name the same is known, may establish such schools therein as they think fit, and make the necessary assessment and collection of rates therefor; and also that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish separate schools therein,—and in such case, the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof:

**2.** The power to pass ordinances, conferred upon the Lieutenant-Governor by this section is hereby declared to have been vested in him from the seventh day of May, one thousand eight hundred and eighty.

**15.** The Lieutenant-Governor in Council may, from time to time, but subject to the provisions of this Act, make ordinances in relation to the administration of justice in the Territories, and to the constitution, maintenance and organization of the Supreme Court, including procedure therein in civil matters, in as full and ample a manner as the Legislature of any Province of

(p) See *ante*, p. 489 and p. 510.

(q) See, however, 54-55 Vic. c. 22, s. 6, enacting a new section 13 to the main Act and giving to the Legislative Assembly the powers defined as above. By some oversight, probably, this section was not repealed, and it would appear that the Lieutenant-Governor in Council has concurrent power, in this connection, with the Assembly.

Canada could, under the fourteenth paragraph of the ninety-second section of "*The British North America Act, 1867*," or otherwise, make laws in relation to the administration of justice in the Province, and to the constitution, maintenance and organization of a provincial court, both of civil and criminal jurisdiction, including procedure in civil matters in such court.

**16.** The Lieutenant-Governor in Council may, from time to time, make ordinances in respect to the mode of calling juries, other than grand juries, in criminal as well as civil cases, and when and by whom and the manner in which they may be summoned or taken, and in respect to all matters relating to the same.

**17.** An authentic copy of every ordinance shall be transmitted by mail to the Secretary of State within thirty days after its passing; and if the Governor in Council, at any time within one year after its receipt by the Secretary of State, thinks fit to disallow the ordinance, such disallowance, when signified by the Secretary of State to the Lieutenant-Governor, shall annul the ordinance from and after the date of such signification; and all ordinances so made, and all Orders in Council disallowing any ordinances so made, shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.

[Sections 18 to 25, both inclusive, were repealed by 51 Vic. c. 19. Sections 26 to 40, both inclusive, relate to "wills" and "married women," and by 54-55 Vic. c. 22, the Assembly of the Territories is empowered to repeal them and make other provision.]

## ADMINISTRATION OF JUSTICE.

Supreme  
court continu-  
ed.

**41.** The Supreme Court of record of original and appellate jurisdiction now existing under the name of "The Supreme Court of the North-West Territories" is hereby continued under the name aforesaid.

Constitution  
of court.

**42.** The Supreme Court shall consist of five puisné judges, who shall be appointed by the Governor in Council by letters patent under the Great Seal.

Who may  
be appointed  
judge.

**43.** Any person may be appointed a judge of the court who is or has been a judge of a Superior Court of any Province of Canada, a stipendiary magistrate of the Territories, or a barrister or advocate of at least ten years' standing at the bar of any such Province, or of the Territories.

No other office  
of emolument  
to be held.

**44.** No judge of the court shall hold any other office of emolument under the Government of Canada, or of any Province thereof, or of the Territories.

Residence.

**45.** Each judge of the court shall reside at such place in the Territories as the Governor in Council, in the commission to such judge, or by Order in Council, directs.

Tenure of  
office.

**46.** The judges of the court shall hold office during good behavior, but shall be removable by the Governor-General, on address of the Senate and House of Commons of Canada.

Oath to be  
taken.

**47.** Every judge shall, previously to entering upon the duties of his office as such judge, take an oath in the form following:—

"I, \_\_\_\_\_, do solemnly and sincerely Form of oath.  
 "promise and swear that I will duly and faith-  
 "fully, and to the best of my skill and know-  
 "ledge, execute the powers and trusts reposed in  
 "me as one of the judges of the Supreme Court  
 "of the North-West Territories. So help me  
 "God."

2. Such oaths shall be administered by the How adminis-  
tered.  
 Lieutenant-Governor or by a judge of the court.

48. The court shall, within the Territories, Jurisdiction  
within the  
Territories,  
civil and crim-  
inal.  
 and for the administration of the laws for the  
 time being in force within the Territories, pos-  
 sess all such powers and authorities as by the  
 law of England are incident to a superior  
 court of civil and criminal jurisdiction; and shall  
 have, use and exercise all the rights, incidents  
 and privileges of a court of record and all other  
 rights, incidents and privileges, as fully to all  
 intents and purposes as the same were on the  
 fifteenth day of July, one thousand eight hun-  
 dred and seventy, used, exercised and enjoyed  
 by any of Her Majesty's superior courts of com-  
 mon law, or by the Court of Chancery, or by the  
 Court of Probate in England,—and shall hold  
 pleas in all and all manner of actions, causes and  
 suits as well criminal as civil, real, personal  
 and mixed,—and shall proceed in such actions,  
 causes and suits by such process and course as  
 are provided by law, and as tend with justice  
 and despatch to determine the same,—and shall  
 hear and determine all issues of law, and shall  
 also hear and (with or without a jury as pro-  
 vided by law) determine all issues of fact joined  
 in any such action, cause or suit, and give judg-  
 ment thereon and award execution thereof in as  
 full and as ample a manner as might at the said



date be done in Her Majesty's Court of Queen's Bench, Common Bench, or in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods) by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

Sittings in  
banc.

**49.** The court shall sit in banc at the seat of government of the Territories at such time as the Lieutenant-Governor in Council appoints: the senior judge present shall preside and any three judges of the court shall constitute a quorum.

Quorum.

Jurisdiction  
in banc.

**50.** The court sitting in banc shall hear and determine all applications for new trials, all questions or issues of law, all questions or points in civil or criminal cases reserved for the opinion of the court, all appeals or motions in the nature of appeals, all petitions and all other motions, matters or things whatsoever which are lawfully brought before it.

Appeals.

Judicial  
districts.

**51.** The Governor in Council may, at any time, by proclamation divide the Territories into judicial districts, and give to each such district an appropriate name, and in like manner, from time to time, alter the limits and extent of such districts.

*[Section 52 was repealed by 54-55 Vic. c. 22, s. 7, and the following substituted:]*

Territorial  
jurisdiction of  
Judges.

**52.** Every Judge of the Court shall have jurisdiction throughout the Territories, but shall usually exercise the same within the judicial district to which he is assigned by the Governor in Council, and in all causes, matters, and proceedings, other than such as are usually cognizable by a court sitting in banc, and not by a single judge of the said court, shall have and

exercise all the powers, authorities and jurisdiction of the court :

2. Subject to any statute prohibiting or re-<sup>Writs of  
certiorari.</sup>stricting proceedings by way of *certiorari*, a single judge shall, in addition to his other powers, have all the powers of the court as to proceedings by way of *certiorari* over the proceedings, orders, convictions, and adjudications had, taken, and made by justices of the peace, and in addition thereto shall have the power of revising, amending, modifying, or otherwise dealing with the same; and writs of *certiorari* may, upon the order of a judge, be issued by the clerk of the court mentioned in such order returnable as therein directed.—54-55 Vic. c. 22, s. 7.]

**53.** Whenever, under any Act in force in the Territories, any power or authority is to be exercised, or anything is to be done by a judge of a court, such power or authority shall, in the Territories, be exercised or such thing shall be done by a judge of the Supreme Court, unless any other provision is made in that behalf by such Act. <sup>Powers of  
single judge.</sup>

**54.** The judges of the Supreme Court shall have all the powers, authority and jurisdiction vested in the stipendiary magistrates of the Territories on the second day of June, one thousand eight hundred and eighty-six; and wherever in any Act of the Parliament of Canada relating to the Territories the words "stipendiary magistrate" or "stipendiary magistrates" are used, the same shall mean a judge or the judges of the Supreme Court, as the case may be. <sup>Judges to  
replace  
the former  
stipendiary  
magistrates.</sup>

**55.** Sittings of the Supreme Court, which shall be presided over by a judge of the court, <sup>Sittings,  
where held.</sup>

shall be held in each judicial district at such times and places as the Lieutenant-Governor of the Territories appoints.

*[Sections 56 to 62, both inclusive, relate to sheriffs and clerks, their duties, etc.]*

Disposal of  
North-West  
Mounted  
Police Force.  
(r)

**63.** The Lieutenant-Governor may, subject to any orders made in that behalf, from time to time, by the Governor in Council, issue orders to the North-West Mounted Police force, in aid of the administration of civil and criminal justice, and for the general peace, order and good government of the Territories.

Justices of the  
peace.

**64.** The Lieutenant-Governor may appoint justices of the peace for the Territories, who shall have jurisdiction as such throughout the same.

*[Sections 65 to 81, both inclusive, relate to the administration of criminal justice; 82 to 87 to coroners and inquests; 88 to 91 to the administration of civil justice; 92 to 100 to intoxicants, and 101 to 108 contain miscellaneous provisions which we need not further notice. Amendments have been made to some of the sections by 51 Vic. c. 19, and 54-55 Vic. c. 22. By section 19 of the latter, power to repeal and alter the law as to intoxicants is given to the Assembly so far as relates to territory covered by electoral districts.]*

#### GENERAL PROVISIONS.

Provision  
when there  
are no such  
officers as  
are designated  
in Act of Parlia-  
ment.

**109.** Whenever in any Act of the Parliament of Canada in force in the Territories, any officer is designated for carrying on any duty therein mentioned, and there is no such officer in

(r) See R. S. C. c. 45, as to this Force.

the Territories, the Lieutenant-Governor in Council may order by what other person or officer such duty shall be performed,—and anything done by such person or officer, under such order, shall be valid and lawful in the premises; or if it is in any such Act ordered that any document or thing shall be transmitted to any officer, court, territorial division or place, and there is then in the Territories no such officer, court or territorial division or place, the Lieutenant-Governor in Council may order to what officer, court or place such transmission shall be made, or may dispense with the transmission thereof.

[*Section 110 relates to the use of the English or French language in the debates of the Assembly. By 54-55 Vic. c. 22, s. 19, the Legislative Assembly has now full control of the question.*]

**111.** Any copy of any proclamation or order made by the Governor in Council, or ordinance, proclamation or order made by the Lieutenant-Governor in Council, or by the Lieutenant-Governor by and with the advice and consent of the Legislative Assembly of the North-West Territories, as the case may be, printed in the *Canada Gazette*, or purporting to be printed by the Queen's Printer for Canada, or by the printer to the Government of Manitoba at Winnipeg, or by the printer to the Government of the North-West Territories, shall be *prima facie* evidence of such proclamation or order, and of the fact that it is in force.

Certain  
printed copies  
of laws, &c.,  
to be evi-  
dence.

#### APPLICATION OF ACTS TO TERRITORIES.

**112.** Every Act of the Parliament of Canada, except in so far as otherwise provided in any such Act, and except in so far as the same is, by

Application  
of Acts of  
Canada.



its terms, applicable only to one or more of the Provinces of Canada, or in so far as any such Act is, for any reason, inapplicable to the Territories, shall, subject to the provisions of this Act, apply and be in force in the Territories:

Governor in  
Council may  
extend Acts  
to the Terri-  
tories.

2. The Governor in Council may, by proclamation, from time to time, direct that any Act of the Parliament of Canada, or any part or parts thereof, or any one or more of the sections of any one or more of any such Acts not then in force in the Territories, shall be in force in the Territories generally, or in any part or parts thereof mentioned in such proclamation.

### *Introduction of English Law.*

As we have already noted (s), the first Act of the parliament of Canada relating to Rupert's Land and the North-Western Territory—32-33 Vic. c. 3—continued all the laws then in existence therein, and this provision runs through all the legislation until the passage of 49 Vic. c. 25, which came into operation on the 18th day of February, 1887 (t). By this Act—see R. S. C. c. 50, s. 11—the English law, civil and criminal, in force on the 15th July, 1870, was introduced into the North-West Territories, subject, of course, to any amendment by Imperial, Dominion, or territorial legislation since that date. We need not elaborate this question here. Applicability is made the test of introduction, and the authorities we have collected and reviewed in chapter V. of this work should be of much assistance to those who have now, in the North-West Territories, to decide similar questions.

The only reported decision of the Supreme Court of the Territories is *Reg. v. Nan-e-quis-a Ka* (u), in which doubt was expressed as to the applicability of the English Mar-

(s) *Ante*, p. 553.

(t) *Dom. Stat.*, 1887, p. clvi.

(u) 1 N. W. T. Rep. 21.

riage Acts (*v*) to the Territories. It was held that at all events they are not in force *quoad* Indians. Reference is made to the decision of Mr. Justice Monk in *Connolly v. Woolrich* (*w*), in which a marriage according to Indian custom, which had taken place in the Athabasca region, was held valid.

But this question remains: What was the law in force in these Territories down to February, 1887? Upon this question we may refer to *Re Calder* (*x*), in which the late Recorder Adam Thom gave at length his reasons for holding that the Court of the Governor and Council of Assiniboia had jurisdiction to try a person for homicide committed on Peace River beyond Great Slave Lake. In his view the territory over which the Hudson Bay Co. had, under its charter, powers of government (*y*), and into which therefore the law of England was carried by that charter, comprised even more than all the country now known as the North-West Territories. Against this view of the Recorder may be cited the judgment, above referred to, of Mr. Justice Monk in *Connolly v. Woolrich*, in which it was held that the jurisdiction of the Hudson's Bay Co. under its charter did not extend westward beyond the navigable waters of the streams flowing into Hudson's Bay; that in these territories the law in force was the English common law of date 1670; and that no alteration in this respect had been made since the acquisition of these territories down to 1867. The view, however, of Recorder Thom is the one recognized in the Territories. According to the construction put upon the ordinance of the Council of Assiniboia, of date 1862, by the Court of Queen's Bench of Manitoba in *Sinclair v. Mulligan* (*z*), the law in force in the Territories prior to February, 1887, was English law of date 1670 so far as applicable, and so far as unaltered by Dominion and territorial legislation prior to 1887.

(*v*) See *ante*, p. 116.

(*y*) See *ante*, p. 550.

(*w*) 11 L. C. Jur. 197; see *post*.

(*z*) 5 Man. L. R. 17; see *post*.

(*x*) 2 Western Law Times 1.

We should also note that in *Re Claxton* (a), one of the Revised Ordinances (1888)—exempting 160 acres of land from seizure under execution—was held invalid as repugnant to the Dominion “Homestead Exemption Act”; and this question is one which, as matters now stand, will frequently arise, and what is said in chapter V., *ante*, may be of assistance in determining the general principles upon which this question must be solved.

In *Reg. v. Keefe* (b) another ordinance was held invalid as being essentially a criminal enactment, the view of the Court of Appeal for Ontario in *Reg. v. Wason* (c) being avowedly adopted. It is thus put by the Supreme Court of the Territories :

“There is no doubt in our minds that the real object and the true nature and character of this legislation . . . was in the interest of public morals to create an offence, and not for the protection of private rights.”

### *Federal Connection.*

POWER TO GIVE THE TERRITORIES PART IN THE DETERMINATION OF  
FEDERAL AFFAIRS IS CONFERRED BY THE FOLLOWING :

#### 49-50 VICTORIA (IMP.), CHAPTER 35.

A.D. 1886.

An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province.

[25th June, 1886.]

WHEREAS it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any

(a) 1 N. W. T. Rep. 88.

(b) *Ib.* 86.

(c) See *ante*, p. 479.

territory which for the time being forms part of the Dominion of Canada, but is not included in any Province :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

**1.** The Parliament of Canada may, from time to time, make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

Provision by  
Parliament of  
Canada for  
representa-  
tion of terri-  
tories.

**2.** Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor-General of Canada.

Effect of Acts  
of Parliament  
of Canada.

It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last-mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act of the Par-



liament of Canada for the representation of any provinces or territories of Canada (*d*).

Short title  
and construc-  
tion.

**3.** This Act may be cited as the British North America Act, 1886.

This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together, and may be cited together as the British North America Acts, 1867 to 1886.

(*d*) The general effect of this section is discussed, *ante*, p. 271 (as to the Senate), and *ante*, p. 282 (as to the House of Commons).

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## CHAPTER XIV.

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### MANITOBA.

The events leading up to the admission of Rupert's Land and the North-Western Territory to the Dominion of Canada have been shortly sketched in the preceding chapter. Taking up the thread now in reference to Manitoba, we have to point out that the Act 33 Vic. c. 3, by which that province was established, was validated by Imperial legislation :

34-35 VIC., CAP. 28.

An Act respecting the establishment of Provinces in the Dominion of Canada.

[*29th June, 1871.*]

**W**HEREAS doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of

the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

**1.** This Act may be cited for all purposes as “The British North America Act, 1871.”

Parliament of Canada may establish new Provinces and provide for the constitution, &c., thereof.

**2.** The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

Alteration of limits of Provinces.

**3.** The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

Parliament of Canada may legislate for any territory not included in a Province.

**4.** The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any Province.

Confirmation of Acts of Parliament of Canada, 32 & 33 Vict., (Can). cap. 3, 33 Vict. (Can). cap. 3.

**5.** The following Acts passed by the said Parliament of Canada, and intituled respectively: “An Act for the temporary government of Rupert’s Land and the North-Western Territory when united with Canada,” and “An Act to

amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the 'government of the Province of Manitoba,' shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last mentioned Act of the said Parliament, in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

Limitation of powers of Parliament of Canada to legislate for an established Province.

Under the 3rd section of this Act, the limits of Manitoba were in 1877 (*a*), and again in 1881 (*b*), altered and its territory considerably increased. The 6th section is the all-important one, not merely to Manitoba but to any province to be hereafter created. It will tend to retard the creation of new provinces until the Territories are so well settled and organized as to be entitled to the same powers of self-government as are now enjoyed by the older provinces. It would be unfortunate to give the name of a province to any division of the Territories, unless at the same time full provincial autonomy were given. In fact it

(*a*) See 40 Vic. c. 6 (Dom.).

(*b*) See 44 Vic. c. 14 (Dom.).



may be doubted if, under the above Act, a province could be created with less power than the provinces named in the B. N. A. Act. However this may be, any Act of the parliament of Canada creative of a new province becomes at once, in effect, an Imperial Act—at all events an Act which can be altered by nothing short of Imperial legislation. Such is the position of Manitoba to-day. Her charter is:

33 VIC., CAP. 3.

An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba.

[Assented to 12th May, 1870.]

Preamble.

WHEREAS it is probable that Her Majesty The Queen may, pursuant to the British North America Act, 1867, be pleased to admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, before the next Session of the Parliament of Canada:

*And Whereas* it is expedient to prepare for the transfer of the said Territories to the Government of Canada at the time appointed by the Queen for such admission:

*And Whereas* it is expedient also to provide for the organization of part of the said Territories as a Province, and for the establishment of a Government therefor, and to make provision for the Civil Government of the remaining part of the said Territories not included within the limits of the Province:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

**1.** On, from and after the day upon which the Queen by and with the advice and consent of Her Majesty's Most Honorable Privy Council, under the authority of the 146th section of the British North America Act, 1867, shall, by Order in Council in that behalf (c), admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, there shall be formed out of the same a Province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba, and be bounded as follows:

Province to be formed out of N. W. territory when united to Canada.

Its name and boundaries.

*[The boundaries as here defined were afterwards altered, and the area of the Province enlarged. See ante, p. 587; also R. S. C. c. 47.]*

**2.** On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act.

Certain provisions of B. N. A. Act, 1867, to apply to Manitoba.

**3.** The said Province shall be represented in the Senate of Canada by two Members, until

Representation in the Senate. (d).

(c) The Order in Council bears date 23 June, 1870, and provides for admission on 15 July, 1870.

(d) Now 3. See R. S. C. c. 12; also ante, p. 268, et seq.

it shall have, according to decennial census, a population of fifty thousand souls, and from thenceforth it shall be represented therein by three Members, until it shall have, according to decennial census, a population of seventy-five thousand souls, and from thenceforth it shall be represented therein by four Members.

Representa-  
tion in the  
House of  
Commons (e).

**4.** The said Province shall be represented, in the first instance, in the House of Commons of Canada, by four Members, and for that purpose shall be divided by proclamation of the Governor-General, into four Electoral Districts, each of which shall be represented by one Member: Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said Province shall be re-adjusted according to the provisions of the fifty-first section of the British North America Act, 1867.

Qualification  
of voters and  
members (f).

**5.** Until the Parliament of Canada otherwise provides, the qualification of voters at Elections of Members of the House of Commons shall be the same as for the Legislative Assembly hereinafter mentioned: And no person shall be qualified to be elected, or to sit and vote as a Member for any Electoral District, unless he is a duly qualified voter within the said Province.

Lieutenant-  
Governor (g).

**6.** For the said Province there shall be an officer styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada.

(e) Now 7. See 55-56 Vic. c. 11 (Dom.); also *ante*, p. 282, *et seq.*

(f) See *ante*, p. 285, *et seq.* The restriction imposed by the latter part of the section has been removed.

(g) See *ante*, p. 300, *et seq.*

**7.** The Executive Council of the Province shall be composed of such persons, and under such designations, as the Lieutenant-Governor shall, from time to time, think fit; and, in the first instance, of not more than five persons. Executive Council (*h*).

**8.** Unless and until the Executive Government of the Province otherwise directs, the seat of Government of the same shall be at Fort Garry, or within one mile thereof. Seat of Government (*i*).

**9.** There shall be a Legislature for the Province, consisting of the Lieutenant-Governor, and of two Houses (*j*), styled respectively, the Legislative Council of Manitoba, and the Legislative Assembly of Manitoba. Legislature.

*[Sections 10-13 relate to the defunct Legislative Council.]*

**14.** The Legislative Assembly shall be composed of twenty-four Members, to be elected to represent the Electoral Divisions into which the said Province may be divided by the Lieutenant-Governor, as hereinafter mentioned. Legislative Assembly.

**15.** The presence of a majority of the Members of the Legislative Assembly shall be necessary to constitute a meeting of the House for the exercise of its powers; and for that purpose the Speaker shall be reckoned as a Member. Quorum.

(*h*) The provisions of this and the following sections, relating to the provincial constitution, have all been the subject of provincial legislation. See R. S. Man. (1888); and see also notes to B. N. A. Act, 1867, s. 92, s-s. 1, *ante*, p. 420, *et seq.*

(*i*) Now "Winnipeg."

(*j*) Now only one. The Legislative Council was abolished by 39 Vic. c. 29 (Man.); see *ante*, p. 326.



*[Sections 16 to 18 relate to first elections, electoral districts, and qualifications of voters. They are long since effete.]*

Duration of  
Legislative  
Assembly (k).

**19.** Every Legislative Assembly shall continue for four years from the date of the return of the writs for returning the same (subject nevertheless to being sooner dissolved by the Lieutenant-Governor), and no longer; and the first Session thereof shall be called at such time as the Lieutenant-Governor shall appoint.

Sessions at  
least once a  
year (l).

**20.** There shall be a Session of the Legislature once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in one Session and its first sitting in the next Session.

Certain pro-  
visions of  
B. N. A. Act,  
1867, to  
apply (m).

**21.** The following provisions of the British North America Act, 1867, respecting the House of Commons of Canada, shall extend and apply to the Legislative Assembly, that is to say:—Provisions relating to the election of a Speaker, originally, and on vacancies,—the duties of the Speaker, the absence of the Speaker and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to the Legislative Assembly.

Legislation  
touching  
schools sub-  
ject to certain  
provisions (n).

**22.** In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect

(k) See *ante*, p. 336.

(l) See *ante*, p. 337.

(m) Compare B. N. A. Act, 1867, s. 87, *ante*, p. 337.

(n) This matter is fully dealt with; *ante*, p. 489, *et seq.*

to Denominational Schools which any class of persons have by Law or practice in the Province at the Union :—

(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education :

(3) In case any such Provincial Law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

**23.** Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Power reserved to Parliament.

English and French languages to be used.

Interest  
allowed to  
the Province  
on a certain  
amount of the  
debt of  
Canada.

**24.** Inasmuch as the Province is not in debt, the said Province shall be entitled to be paid, and to receive from the Government of Canada, by half-yearly payments in advance, interest at the rate of five per centum per annum on the sum of four hundred and seventy-two thousand and ninety dollars.

Subsidy to  
the Province  
for support of  
Government,  
and in pro-  
portion to its  
population.

**25.** The sum of thirty thousand dollars shall be paid yearly by Canada to the Province, for the support of its Government and Legislature, and an annual grant, in aid of the said Province, shall be made, equal to eighty cents per head of the population, estimated at seventeen thousand souls; and such grant of eighty cents per head shall be augmented in proportion to the increase of population, as may be shown by the census that shall be taken thereof in the year one thousand eight hundred and eighty-one, and by each subsequent decennial census, until its population amounts to four hundred thousand souls, at which amount such grant shall remain thereafter, and such sum shall be in full settlement of all future demands on Canada, and shall be paid half-yearly, in advance, to the said Province.

Canada  
assumes cer-  
tain expenses.

**26.** Canada will assume and defray the charges for the following services:—

1. Salary of the Lieutenant-Governor.
2. Salaries and allowances of the Judges of the Superior and District or County Courts.
3. Charges in respect of the Department of the Customs.
4. Postal Department.
5. Protection of Fisheries.
6. Militia.
7. Geological Survey.

## 8. The Penitentiary.

9. And such further charges as may be <sup>General provision.</sup> incident to, and connected with the services which, by the British North America Act, 1867, appertain to the General Government, and as are or may be allowed to the other Provinces.

*[Sections 27-29 relate to customs and inland revenue and are effete.]*

**30.** All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except and so far as the same may be affected by, the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty.

**31.** And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor-General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of

Ungranted lands vested in the Crown for Dominion purposes (o).

Provisions as to Indian title.

Grant for half breeds (p).

(o) See *post*, for some observations on the position of Manitoba in relation to lands within her borders.

(p) There has been much legislation by the parliament of Canada in reference to the adjustment of the claims of half-breeds and squatters, but the subject is hardly within our range.



families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor-General in Council may from time to time determine.

Quieting  
titles.

**32.** For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows :—

Grants by  
H. B. Com-  
pany.

1. All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

The same.

2. All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March, aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

Titles being  
occupancy  
with per-  
mission;

3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March, aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

By peaceable  
possession.

4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.

5. The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor-General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

Lieutenant-Governor to make provisions under Order in Council.

33. The Governor-General in Council shall from time to time settle and appoint the mode and form of Grants of Land from the Crown, and any Order in Council for that purpose when published in the *Canada Gazette*, shall have the same force and effect as if it were a portion of this Act.

Governor in Council to appoint form, &c., of grants.

34. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company, as contained in the conditions under which that Company surrendered Rupert's Land to Her Majesty.

Rights of H. B. Company not affected.

[Sections 35 and 36 are long since effete.]

### *English Law in Manitoba.*

We have already (*q*) had occasion to refer to the provision of the first Dominion Statute (32-33 Vic. c. 3), dealing with Rupert's Land and the North-Western Territory, which continued in force in that country the laws then in force there. We have also referred (*r*) to the question as to what those laws then in force were. This question has been much discussed in Manitoba. Its position in this

(*q*) *Ante*, p. 553.

(*r*) *Ante*, p. 581.

matter—both (1) as to the date upon which such introduction took place, (2) the extent of such introduction, (3) the effect to be given to that ordinance of the old Assiniboia Council, to which we shall have to refer, as well as (4) the extent of the introduction subsequently effected by provincial Acts—was considered by the Court of Queen's Bench (s) upon an appeal from the judgment of Killam, J. (t), in *Sinclair v. Mulligan*. The first three questions are exhaustively discussed in the latter judgment, and the opinions expressed therein were adopted by the full Court, Mr. Justice Dubuc, however, expressing some doubt as to the correctness of the construction placed by the other judges upon the Assiniboia ordinance. The holding of the Court may be summed up in the language of Taylor, C.J. :

“Until 1870, the law of England, at the date of the Hudson's Bay Company's charter, 1670, was the law in force here, and indeed, except as to matters which have been dealt with by the Dominion parliament, *or which are within the jurisdiction of the Provincial legislature and have been dealt with by it*, that is the law of this province at the present day.”

In his judgment, Mr. Justice Killam adopts the view, upon which enough has been said in chapter V., *ante*, that the question of applicability is one proper for consideration. The ordinance of 1862 (u) he construed as a law regulative of practice and procedure merely, and not as a law bringing forward the date as of which English law, in the general sense of that term, was to be deemed to be introduced into those Territories—a question as to which the doubt expressed by Mr. Justice Dubuc seems to have much to support it. In the result, the Statute of Uses was held to be in force, the Statute of Enrolment was held inapplicable, and the Statute of Frauds not to be in force because of date

(s) 5 Man. L. R. 17.

(t) 3 Man. L. R. 481.

(u) The language of this ordinance was very much the same as that of s. 38 of 34 Vic. c. 2 (Man.), quoted *post*.

subsequent to the H. B. Co.'s charter; and a verbal bargain as to land was given effect to under the Statute of Uses.

One of the first Acts of the Manitoba Legislature (34 Vic. c. 2), was to establish a Supreme Court for the province, having the jurisdiction distributed in England between the Superior Courts of Law and Equity and of Probate. By sections 38, 51 and 52 of this Act it was provided:

"38. As far as possible consistently with the circumstances of the country the laws of evidence and the principles which govern the administration of justice in England shall obtain in the Supreme Court of Manitoba.

"51. So much of the laws of the Governor and Council of Assiniboia as may be inconsistent with this Act, is hereby repealed.

"52. So much of the laws of the Governor and Council of Assiniboia as are not repealed by the preceding section, or are not inconsistent with this Act, or with any other Act to be passed during this session, shall be extended to the whole of the province of Manitoba."

Section 38 would no doubt receive the same construction as the ordinance of 1862 afterwards received in *Sinclair v. Mulligan* (see *ante*), and be limited to the regulation of practice and procedure, and this statute therefore is of importance upon this question only as putting aside any doubt as to the extent of the territorial operation of the laws of the Assiniboia Council.

In 1874, by 38 Vic. c. 12 (see *Con. Stat. Man.*, 1880, c. 31), it was enacted:

"The Court of Queen's Bench (*v*) shall decide and determine all matters of controversy relative to property and civil rights according to the laws existing, or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province. . . ."

(*v*) "The Supreme Court of Manitoba" was given this name by 35 Vic. c. 3.



with a clause as to evidence, and practice and procedure, to the same effect. Were it not for the sharp distinction drawn between law and practice in this enactment, it might be contended that, so far as the general adoption of English law is concerned, it should receive the same construction as the Assiniboia ordinance of 1862, and be limited to the introduction of English practice and procedure. It has, however, been uniformly treated as introducing general English law as it stood on the 15th of July, 1870, and there can be little doubt that such is its proper construction.

In reference to the limited operation of any provincial statute introducing English law, it seems impossible to escape from the result indicated by Taylor, C.J., in the passage of his judgment which we have italicized (*w*). From time to time the parliament of Canada has passed statutes introducing certain portions of the statute law of the Dominion, passed prior to 1870, into Manitoba. Statutes since 1870 are of course in force there unless expressly excepted. But there had been no general provision made as to those matters which are within the legislative competence of the Dominion parliament, so that the law in Manitoba as to all such matters was, until 1888, the English law of 1670. As to matters within the legislative competence of the provincial legislature there has been, as we have seen, such general legislation—not, indeed, in terms so confined, but judicially determined to be so limited. In *Canadian Bank of Commerce v. Adamson* (*x*) it had been held that the English Bill of Exchange Act (18 & 19 Vic. c. 67), was in force in Manitoba, but this decision was based upon a construction of the ordinance of 1862, which was not followed in *Sinclair v. Mulligan*. However, by 51 Vic. c. 33 (Dom.)—for the removal of doubts—the difficulty suggested in reference to the introduction of English law in relation to matters other than

(*w*) *Ante*, p. 598.

(*x*) 1 Man. L. R. 3.

those within the legislative competence of a provincial legislature was removed, and it was enacted that:

“The laws of England relating to matters within the jurisdiction of the parliament of Canada, as the same existed on the 15th July, 1870, were from the said day and are in force in the province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been and are not hereafter repealed, altered, varied, modified, or affected by any Act of the parliament of the United Kingdom applicable to the said province, or of the parliament of Canada.”

the legal rate of interest, however, being placed at six per cent., as in the other provinces.

The same principle in reference to the introduction of English statutory law of local application in England has been invoked in Manitoba, as in the older provinces (*y*). In *Attorney-General v. Richard* (*z*), it was held by Chief Justice Wallbridge, that the Imperial statute 18 & 19 Vic. c. 90, under which costs may be ordered against the Crown in England, was not introduced into Manitoba by the provincial Act to which we have above referred:

“That Act is local as to England, and required a special Act to make it applicable to the Isle of Man; besides, the manner of obtaining costs pointed out under it could not apply here. We have not the officers, or the means territorially of enforcing a demand for costs, and the court will not make a decree which it cannot enforce.”

### *Public Lands in Manitoba.*

Upon the formation of the province of Manitoba (*a*), provision was made for the administration by the Governor in Council of the public lands of that province as a federal asset. Statutes have from time to time been passed making provision for the issue of Letters Patent granting such lands to purchasers from the Hudson's Bay Co., to

(*y*) *Ante*, p. 120.

(*z*) 4 Man. L. R. 336.

(*a*) See 33 Vic. c. 3, s. 30, *ante*, p. 595.

half-breeds, squatters, and subsequent settlers (*b*). A large portion has been granted to the Canadian Pacific Railway Co., under the terms of its charter, and up to the present time the only concession to the province is that contained in R. S. C. c. 47, under which swamp lands are to be transferred to the province, and an endowment of 150,000 acres is provided for the University of Manitoba. The additional territory since annexed to the province is in the same position, being subject moreover to interests acquired therein, prior to such annexation, under Dominion legislation.

A very interesting question came before the Court of Queen's Bench in Manitoba, in 1891, in reference to the power of the Canadian Pacific Railway Co. to hold land in that province without taking out the license required by provincial statutes (*c*). In delivering the judgment of the Court, Mr. Justice Killam says:

“By the Act, 49 Vic. c. 11, s. 4 (Man.), ‘No company, corporation, or other institution not incorporated under the provisions of the statutes of this province, shall be capable of taking, holding, or acquiring any real estate within this province unless under license from the Lieutenant-Governor in Council, under any statute of this province.’ Several statutes have, from time to time, been passed by the provincial legislature, authorizing the issue of licenses to corporations, permitting them to take and hold lands or securities upon lands in Manitoba. These have been repealed and consolidated and to some extent amended by the Act, 53 Vic. c. 23, s. 15 (Man.). The C. P. R. Co. has taken out no license under any of these statutes. . . . By the Act, 44 Vic. c. 14 (Dom.), provision was made for the extension of Manitoba by including within it certain territory, formerly a portion of the North-West Territories. One term of this extension was, as provided by section 2, sub-section (1): ‘The said increased limit and territory thereby added to the province of Manitoba shall be subject to all such provisions as

(*b*) See R. S. C. c. 48.

(*c*) 7 Man. L. R. 389, *Re* C. P. R. Co.

may have been, or shall hereafter be enacted respecting the C. P. R., and the lands to be granted in aid thereof.' The assent of the Legislature of Manitoba to this extension and its terms was given by the Acts 44 Vic. (3rd session) c. 1 and 6, assented to respectively the 4th March and 21st May, 1881. The extension took effect the 1st July, 1881. . . . Before the territory in question was included in Manitoba, and when the Act 44 Vic. c. 1 (Dom.) was passed, that territory was not included in any province, and was subject fully to the legislative authority of the parliament of Canada in all matters. Whatever, then, might be the position in the provinces, that parliament could authorize any corporation to take and hold lands in the North-West Territories. It is difficult to conceive any more effectual mode of conferring such a power than is exhibited in the statute 44 Vic. c. 1 (Dom.), the contract and the charter. And, to wind up the transaction, the lands are to be granted to the Company by the letters patent of the Crown."

As an indemnity, however, for the want of public lands, the province receives, in addition to other subsidy, a subsidy of \$100,000 per annum from the federal government.

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## CHAPTER XV.

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### BRITISH COLUMBIA.

The proceedings which culminated in the admission of British Columbia to the Union sufficiently appear in the following:—

#### ORDER IN COUNCIL

RESPECTING

THE PROVINCE OF BRITISH COLUMBIA (*d*).

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AT the Court at *Windsor*, the 16th day of *May*, 1871.

PRESENT.

The QUEEN'S MOST Excellent Majesty.

His Royal Highness Prince ARTHUR.

Lord Privy Seal.

Lord Chamberlain,

Earl Cowper.

Mr. Secretary Cardwell.

Earl of Kimberley.

Mr. Ayrton.

WHEREAS by the "*British North America Act, 1867*," provision was made for the Union of the Provinces of Canada, Nova Scotia and New Brunswick into the

(*d*) See Dom. Stat., 1872, p. lxxxiv. See also B. N. A. Act, s. 146.

Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of Parliament of Canada, and of the Legislature of the Colony of British Columbia, to admit that Colony into the said Union, on such terms and conditions as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act; And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland:

And whereas by Addresses from the Houses of the Parliament of Canada, and from the Legislative Council of British Columbia respectively, of which Addresses copies are contained in the Schedule to this Order annexed, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit British Columbia into the Dominion of Canada, on the terms and conditions set forth in the said Addresses:

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby declared by Her Majesty, by and with the advice of Her Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Act of Parliament, that *from and after the twentieth day of July, one thousand eight hundred and seventy-one, the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada*, upon the terms and conditions set forth in the hereinbefore recited Addresses. And, in accordance with the terms of the said Addresses relating to the Electoral Districts of British Columbia, for which the first election of members to serve in the House of Commons of the said Dominion shall take place, it is hereby

further ordered and declared that such electoral districts shall be as follows :—

[*Here follows an enumeration of these electoral districts.*]

And the Right Honorable Earl of Kimberley, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions therein accordingly.

ARTHUR HELPS.

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## SCHEDULE.

*Address of the Senate of Canada (è).*

To the Queen's Most Excellent Majesty.

*Most Gracious Sovereign,*

We, Your Majesty's most dutiful and loyal subjects, the Senate of Canada in Parliament assembled, humbly approach Your Majesty for the purpose of representing :—

That by a despatch from the Governor of British Columbia, dated 23rd January, 1871, with other papers laid before this House, by message from His Excellency the Governor-General, of the 27th February last, this House learns that the Legislative Council of that colony, in council assembled, adopted, in January last, an Address representing to Your Majesty that British Columbia was prepared to enter into Union with the Dominion of Canada, upon the terms and conditions mentioned in the said Address, which is as follows :

To the Queen's Most Excellent Majesty.

*Most Gracious Sovereign,*

We, Your Majesty's most dutiful and loyal subjects, the Members of the Legislative Council of British Columbia,

(e) The address of the House of Commons is identical in its terms.

in council assembled, humbly approach Your Majesty for the purpose of representing :—

That, during the last session of the late Legislative Council, the subject of the admission of the Colony of British Columbia into the Union or Dominion of Canada, was taken into consideration, and a resolution on the subject was agreed to, embodying the terms upon which it was proposed that this colony should enter the Union ;

That after the close of the session, Delegates were sent by the Government of this Colony to Canada to confer with the Government of the Dominion with respect to the admission of British Columbia into the Union upon the terms proposed ;

That after considerable discussion by the Delegates with the Members of the Government of the Dominion of Canada, the terms and conditions hereinafter specified were adopted by a Committee of the Privy Council of Canada, and were by them reported to the Governor-General for his approval ;

That such terms were communicated to the Government of this Colony by the Governor-General of Canada, in a despatch dated July 7th, 1870, and are as follows :—

1. Canada shall be liable for the debts and liabilities of British Columbia existing at the time of the Union.

2. British Columbia not having incurred debts equal to those of the other Provinces now constituting the Dominion, shall be entitled to receive, by half-yearly payments in advance, from the General Government, interest at the rate of five per cent. per annum on the difference between the actual amount of its indebtedness at the date of the Union, and the indebtedness per head of the population of Nova Scotia and New Brunswick (27.77 dollars), the population of British Columbia being taken at 60,000.

3. The following sums shall be paid by Canada to British Columbia for the support of its Government and



Legislature, to wit, an annual subsidy of 35,000 dollars, and an annual grant equal to 80 cents per head of the said population of 60,000, both half-yearly in advance, such grant of 80 cents per head to be augmented in proportion to the increase of population, as may be shown by each subsequent decennial census, until the population amounts to 400,000, at which rate such grant shall thereafter remain, it being understood that the first census be taken in the year 1881.

4. The Dominion will provide an efficient mail service, fortnightly, by steam communication between Victoria and San Francisco, and twice a week between Victoria and Olympia; the vessels to be adapted for the conveyance of freight and passengers.

5. Canada will assume and defray the charges for the following services :

- A. Salary of the Lieutenant-Governor ;
- B. Salaries and allowances of the Judges of the Superior Courts and the County or District Courts ;
- C. The charges in respect to the Department of Customs ;
- D. The Postal and Telegraph Services ;
- E. Protection and encouragement of Fisheries ;
- F. Provision for the Militia ;
- G. Lighthouses, Buoys and Beacons, Shipwrecked Crews, Quarantine and Marine Hospitals, including a Marine Hospital at Victoria ;
- H. The Geological Survey ;
- I. The Penitentiary ;

And such further charges as may be incident to and connected with the services which by the "British North America Act, 1867," appertain to the General Government, and as are or may be allowed to the other Provinces.

6. Suitable pensions, such as shall be approved of by Her Majesty's Government, shall be provided by the Gov-

ernment of the Dominion for those of Her Majesty's servants in the Colony whose position and emoluments derived therefrom would be affected by political changes on the admission of British Columbia into the Dominion of Canada.

7. It is agreed that the existing Customs tariff and Excise duties shall continue in force in British Columbia until the railway from the Pacific coast and the system of railways in Canada are connected, unless the Legislature of British Columbia should sooner decide to accept the Tariff and Excise Laws of Canada (*f*). When Customs and Excise duties are, at the time of the union of British Columbia with Canada, leviable on any goods, wares or merchandise in British Columbia, or in the other Provinces of the Dominion, those goods, wares and merchandise may, from and after the Union, be imported into British Columbia from the Provinces now composing the Dominion, or into either of those Provinces from British Columbia on proof of payment of the Customs or Excise duties leviable thereon in the Province of exportation and on payment of such further amount (if any) of Customs or Excise duties as are leviable thereon in the Province of importation. This arrangement to have no force or effect after the assimilation of the Tariff and Excise duties of British Columbia with those of the Dominion.

8. British Columbia shall be entitled to be represented in the Senate by three members, and by six members in the House of Commons. The representation to be increased under the provisions of "British North America Act, 1867."

9. The influence of the Dominion Government will be used to secure the continued maintenance of the naval station at Esquimalt.

(*f*) See 35 V. c. 37. On 27th March, 1872, British Columbia decided to accept the Canadian tariff, hence the enactment.

10. *The provisions of the "British North America Act, 1867," shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only effect one and not the whole of the Provinces comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the said Act.*

11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.

And the Government of British Columbia agree to convey to the Dominion Government in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands (*g*) along the line of railway throughout its entire length in British Columbia (not to exceed, however, twenty (20) miles on each side of said line,) as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be

(*g*) See Attorney-General of British Columbia v. Attorney-General of Canada, 14 App. Cas. 295; noted, *ante*, p. 530.

made good to the Dominion from contiguous public lands; and provided further, that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

12. The Dominion Government shall guarantee the interest for ten years from the date of the completion of the works, at the rate of five per centum per annum, on such sum, not exceeding £100,000 sterling, as may be required for the construction of a first-class graving dock at Esquimalt.

13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.



14. *The Constitution of the Executive Authority and of the Legislature of British Columbia shall, subject to the provisions of the "British North America Act, 1867," continue as existing at the time of the Union until altered under the authority of the said Act, it being at the same time understood that the Government of the Dominion will readily consent to the introduction of responsible government when desired by the inhabitants of British Columbia, and it being likewise understood that it is the intention of the Governor of British Columbia, under the authority of the Secretary of State for the Colonies, to amend the existing Constitution of the Legislature by providing that a majority of its Members shall be elective.*

The Union shall take effect according to the foregoing terms and conditions on such day as Her Majesty by and with the advice of Her Most Honorable Privy Council may appoint (on addresses from the Legislature of the Colony of British Columbia and of the Houses of Parliament of Canada in the terms of the 146th section of the "British North America Act, 1867,") and British Columbia may in its address specify the electoral districts for which the first election of Members to serve in the House of Commons shall take place.

That such terms have proved generally acceptable to the people of this Colony.

That this Council is, therefore, willing to enter into Union with the Dominion of Canada upon such terms, and humbly submit that, under the circumstances, it is expedient that the admission of this Colony into such Union, as aforesaid, should be effected at as early a date as may be found practicable under the provisions of the 146th section of the "British North America Act, 1867.

We, therefore, humbly pray that Your Majesty will be graciously pleased, by and with the advice of Your Majesty's Most Honorable Privy Council, under the provisions of the 146th section of "British North America.

Act, 1867," to admit British Columbia into the Union or Dominion of Canada, on the basis of the terms and conditions offered to this Colony by the Government of the Dominion of Canada, hereinbefore set forth; and inasmuch as by the said terms British Columbia is empowered in its address to specify the electoral districts for which the first election of members to serve in the House of Commons shall take place, we humbly pray that such electoral districts may be declared, under the Order in Council, to be as follows: (*Here follows an enumeration of such districts. See now R. S. C. c. 6.*)

We further humbly represent, that the proposed terms and conditions of Union of British Columbia with Canada, as stated in the said Address, are in conformity with those preliminarily agreed upon between delegates from British Columbia and the Members of the Government of the Dominion of Canada, and embodied in a Report of a Committee of the Privy Council, approved by His Excellency the Governor-General in Council, on the 1st July, 1870, which approved Report is as follows:

*Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor-General in Council, on the 1st of July, 1870.*

The Committee of the Privy Council have had under consideration a Despatch, dated the 7th May, 1870, from the Governor of British Columbia, together with certain Resolutions submitted by the Government of that colony to the Legislative Council thereof—both hereunto annexed—on the subject of the proposed Union of British Columbia with the Dominion of Canada; and after several interviews between them and the Honorable Messrs. Trutch, Helmcken and Carrall, the Delegates from British Columbia, and full discussion with them of the various questions connected with that important subject, the Committee now respectfully submit for Your Excellency's

approval, the following terms and conditions to form the basis of a political union between British Columbia and the Dominion of Canada: (*Setting out such terms as before*).

(Certified.)

W. M. H. LEE,

Clerk Privy Council.

We further humbly represent that we concur in the terms and conditions of Union set forth in the said Address, and approved Report of the Committee of the Privy Council above mentioned; and most respectfully pray that your Majesty will be graciously pleased, by and with the advice of your Majesty's most Honorable Privy Council, under the 146th clause of "The British North America Act, 1867," to unite British Columbia with the Dominion of Canada, on the terms and conditions above set forth.

The Senate, Wednesday, April 5th, 1871.

(Signed.)

JOSEPH CAUCHON, Speaker.

*Provincial Constitution.*

Before the Union took effect, British Columbia had made the intended alteration referred to in item 14, above—by Act of the colonial legislature (No. 147 of 34 Vic.) This statute recites an Imperial Order in Council of 9th August, 1870, which established in the colony a legislative council, consisting of nine elective and six non-elective members, and which gave power to the Governor of the colony, with the advice and consent of the legislative council, to make laws for the peace, order, and good government of the colony; it recites also the Colonial Laws Validity Act, 1865 (*h*), as sufficient warrant for the contemplated change in the colonial constitution; and then proceeds to abolish the legislative council and to establish in its stead a legis-

(*h*) See *ante*, p. 422. See the Act in Appendix.

lative assembly of wholly elective members. The present provincial constitution can be studied in the Consolidated Statutes of the province (1888) chapter 22.

*Introduction of English Law.*

In the same session (by Act No. 70 of 34 Vic.) it was provided that—

“The civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia.”

This statute was held (*i*) to introduce the English “Matrimonial Causes Act, 1857,” Chief Justice Begbie, however, dissenting from the judgment of the majority, the local circumstances of the colony precluding, in his opinion, its operation therein.

In *Reynolds v. Vaughan* (*j*), it was held that under this statute Imperial Orders in Council, even though passed pursuant to Imperial statutes which were themselves in force in the colony, would not operate therein, unless made specially applicable by subsequent Imperial or colonial enactment.

We may note also the case of *Sproule v. Reg.* (*k*), in which is discussed the question as to the operation of provincial jury laws in criminal cases. It includes in “organization” some matters in reference to the procurement of a jury, which in Ontario were deemed matters of “procedure,” and in this view upholds provincial legislation even apart from the Dominion Criminal Procedure Act.

Reference to the decisions of the British Columbia courts—particularly those of date closely following the admission of the province—discloses that very extreme

(*i*) *M. falsely called S. v. S.*, 1 B. C. Rep. 25.

(*j*) 1 B. C. Rep. 3.

(*k*) 2 B. C. Rep. 219; see *ante*, p. 417.



views were entertained as to the predominancy of the parliament of Canada over the provincial legislatures. The formula (*l*) enunciated in *Fredericton v. Reg.* was adopted, and in the “Thrasher” Case (*m*) carried to lengths which in view of the later decisions cannot be maintained. We should, however, note that in British Columbia have arisen the only cases in reference to the power of a provincial legislature to legislate in regard to aliens. The “Chinese Tax Act, 1878,” was held (*n*) *ultra vires* as an infringement upon the power of the Dominion parliament over trade and commerce and over aliens, and as inconsistent with the provisions of section 132 of the B. N. A. Act, vesting in that parliament power to pass laws in aid of the treaty obligations of the Empire so far as they affect Canada. In two later cases (*o*) the same principle was applied, and a provincial Act imposing a differential tax upon Chinese miners was also held invalid.

By R. S. C. c. 144, s. 2, it is provided :

2. The criminal law of England as it stood on the 19th day of November, in the year 1858, and as the same has since been repealed, altered, varied, modified or affected by any ordinance or Act (still having the force of law) of the colony of British Columbia, or of the colony of Vancouver Island before the Union of such colonies, or of the colony of British Columbia passed since such Union, or by any Act of the parliament of Canada, shall be the criminal law of the province of British Columbia.

In view of the recent codification of our criminal law, it is not worth while to discuss the effect of this enactment on the Colonial Act which made “applicability” the test (*p*), of the introduction into the colony of English law.

(*l*) See *ante*, p. 206.

(*m*) 1 B. C. Rep. 153.

(*n*) *Tai Sing v. Maguire*, 1 B. C. Rep. 101—Mr. Justice Gray.

(*o*) *Reg. v. Wing Chong*, 2 B. C. Rep. 150; *Reg. v. Gold Commissioners of Victoria*, *ib.* 260—Sup. Ct. B. C.; see also notes to s. 91, s-s. 25.

(*p*) See *ante*, p. 615; see also chapter V. upon the general question.

## CHAPTER XVI.

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### PRINCE EDWARD ISLAND.

The admission of Prince Edward Island to the Dominion was effected by the following Order in Council :

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At the Court at *Windsor*, the 26th day of *June*, 1873.

PRESENT :

The QUEEN'S Most Excellent Majesty.

Lord President.

Earl of Kimberley.

Earl Granville.

Lord Chamberlain.

Mr. Gladstone.

WHEREAS by the "British North America Act, 1867," provision was made for the Union of the Provinces of Canada, Nova Scotia and New Brunswick into the Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honorable Privy Council, on Addresses from the Houses of the Parliament of Canada, and of the Legislature of the Colony of Prince Edward Island, to admit that Colony into the said Union on such terms and conditions as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act; and it was further enacted that the provisions of any Order in

Council in that behalf, should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

And whereas by Addresses from the Houses of the Parliament of Canada, and from the Legislative Council and House of Assembly of Prince Edward Island respectively, of which Addresses, copies are contained in the Schedule to this Order annexed, Her Majesty was prayed, by and with the advice of Her Most Honorable Privy Council, under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit Prince Edward Island into the Dominion of Canada, on the terms and conditions set forth in the said Addresses.

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby ordered and declared by Her Majesty, by and with the advice of Her Privy Council, in pursuance and exercise of the powers vested in Her Majesty, by the said Act of Parliament, that from and after the first day of July, one thousand eight hundred and seventy-three, the said Colony of Prince Edward Island shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore cited Addresses.

And in accordance with the terms of the said Addresses relating to the Electoral Districts for which, the time within which, and the laws and provisions under which the first election of members to serve in the House of Commons of Canada, for such Electoral Districts shall be held, it is hereby further ordered and declared that "Prince County" shall constitute one district, to be designated "Prince County District," and return two members; that "Queen's County" shall constitute one district, to be designated "Queen's County District," and return two members; that "King's County" shall constitute one district, to be designated "King's County District," and return two members; that the election of members to

serve in the House of Commons of Canada, for such Electoral Districts shall be held within three calendar months from the day of the admission of the said Island into the Union or Dominion of Canada; that all laws which at the date of this Order in Council relating to the qualification of any person to be elected or sit or vote as a member of the House of Assembly of the said Island, and relating to the qualifications or disqualifications of voters, and to the oaths to be taken by voters, and to Returning Officers and Poll Clerks, and their powers and duties, and relating to Polling Divisions within the said Island, and relating to the proceedings at elections, and to the period during which such elections may be continued, and relating to the trial of controverted elections, and the proceedings incidental thereto, and relating to the vacating of seats of the members, and to the execution of new writs, in case of any seat being vacated otherwise than by a dissolution, and to all other matters connected with or incidental to elections of members to serve in the House of Assembly of the said Island, shall apply to elections of members to serve in the House of Commons for the Electoral Districts situate in the said Island of Prince Edward.

And the Right Honorable Earl of Kimberley, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions herein, accordingly.

ARTHUR HELPS.

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### SCHEDULE.

To the QUEEN'S Most Excellent Majesty.

*Most Gracious Sovereign,*

We, Your Majesty's most dutiful and loyal subjects, the Commons of the Dominion of Canada in Parliament assembled, humbly approach Your Majesty for the purpose of representing:—



That during the present Session of Parliament we have taken into consideration the subject of the admission of the Colony of Prince Edward Island into the Union or Dominion of Canada, and have resolved that it is expedient that such admission should be effected at as early a date as may be found practicable, under the one hundred and forty-sixth section of the "British North America Act, 1867," on the conditions hereinafter set forth, which having been agreed upon with the Delegates from the said Colony; that is to say :—

That Canada shall be liable for the debts and liabilities of Prince Edward Island at the time of the Union ;

That in consideration of the large expenditure authorized by the Parliament of Canada for the construction of railways and canals, and in view of a possibility of a re-adjustment of the financial arrangements between Canada and the several Provinces now embraced in the Dominion, as well as the isolated and exceptional condition of Prince Edward Island, that Colony shall, on entering the Union, be entitled to incur a debt equal to fifty dollars per head of its population, as shewn by the Census Returns of 1871, that is to say : four millions seven hundred and one thousand and fifty dollars ;

That Prince Edward Island not having incurred debts equal to the sum mentioned in the next preceding Resolution, shall be entitled to receive, by half-yearly payments, in advance, from the General Government, interest at the rate of five per cent. per annum on the difference, from time to time, between the actual amount of its indebtedness and the amount of indebtedness authorized as aforesaid, viz., four millions seven hundred and one thousand and fifty dollars ;

That Prince Edward Island shall be liable to Canada for the amount (if any) by which its public debt and liabilities at the date of the Union, may exceed four millions seven hundred and one thousand and fifty dollars and shall be

chargeable with interest at the rate of five per cent. per annum on such excess ;

That as the Government of Prince Edward Island holds no land from the Crown, and consequently enjoys no revenue from that source for the construction and maintenance of local works, the Dominion Government shall pay by half-yearly instalments, in advance, to the Government of Prince Edward Island, forty-five thousand dollars per annum, less interest at five per cent. per annum, upon any sum not exceeding eight hundred thousand dollars which the Dominion Government may advance to the Prince Edward Island Government for the purchase of lands now held by large proprietors ;

That in consideration of the transfer to the Parliament of Canada of the powers of taxation, the following sums shall be paid yearly by Canada to Prince Edward Island, for the support of its Government and Legislature, that is to say, thirty thousand dollars and an annual grant equal to eighty cents per head of the population, as shown by the Census returns of 1871, viz., 94,021, both by half-yearly payments in advance, such grant of eighty cents per head to be augmented in proportion to the increase of population of the Island as may be shown by each subsequent decennial Census, until the population amounts to four hundred thousand, at which rate such grant shall thereafter remain it being understood that the next Census shall be taken in the year 1881 ;

That the Dominion Government shall assume and defray all the charges for the following services, viz.:—

The salary of the Lieutenant Governor ;

The salaries of the Judges of the Superior Court and of the District or County Courts when established ;

The charges in respect of the Department of Customs ;

The Postal Department ;

The protection of Fisheries ;

The provision for the Militia ;

The Lighthouses, Shipwrecked Crews, Quarantine, and Marine Hospitals ;

The Geological Survey ;

The Penitentiary ;

Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion ;

The maintenance of telegraphic communication between the Island and the mainland of the Dominion ;

And such other charges as may be incident to, and connected with, the services which by the "British North America Act, 1867," appertain to the General Government, and as are or may be allowed to the other Provinces ;

That the railways under contract and in course of construction for the Government of the Island, shall be the property of Canada ;

That the new building in which are held the Law Courts, Registry Office, etc., shall be transferred to Canada, on the payment of sixty-nine thousand dollars. The purchase to include the land on which the building stands, and a suitable space of ground in addition, for yard room, &c. ;

That the Steam Dredge Boat in course of construction, shall be taken by the Dominion, at a cost not exceeding twenty-two thousand dollars ;

That the Steam Ferry Boat owned by the Government of the Island, and used as such, shall remain the property of the Island ;

That the population of Prince Edward Island having been increased by fifteen thousand or upwards since the year 1861, the Island shall be represented in the House of Commons of Canada by six Members ; the representation

to be re-adjusted, from time to time, under the provisions of the "British North America Act, 1867";

*That the constitution of the Executive Authority and of the Legislature of Prince Edward Island, shall, subject to the provisions of the "British North America Act, 1867," continue, as at the time of the Union, until altered under the authority of the said Act, and the House of Assembly of Prince Edward Island existing at the date of the Union shall, unless sooner dissolved, continue for the period for which it was elected;*

*That the Provisions in the "British North America Act, 1867," shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be especially applicable to, and only to affect one and not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island, in the same way and to the same extent as they apply to the other Provinces of the Dominion, and as if the Colony of Prince Edward Island had been one of the Provinces originally united by the said Act.*

That the Union shall take place on such day as Her Majesty may direct by Order in Council, on Addresses to that effect from the Houses of Parliament of Canada and of the Legislature of the Colony of Prince Edward Island, under the one hundred and forty-sixth section of the "British North America Act, 1867," and that the Electoral Districts for which, the time within which, and the laws and provisions under which, the first Election of Members to serve in the House of Commons of Canada for such Electoral Districts shall be held, shall be such as the said Houses of the Legislature of the said Colony of Prince Edward Island may specify in their said Addresses.

We, therefore, humbly pray that Your Majesty will be graciously pleased, by and with the advice of Your Majesty's Most Honourable Privy Council, under the provisions of the



one hundred and forty-sixth section of the "British North America Act, 1867," to admit Prince Edward Island into the Union or Dominion of Canada, on the terms and conditions hereinbefore set forth.

(Signed) JAMES COCKBURN,  
Speaker.

House of Commons,  
20th May, 1873.

A similar address was voted by the Senate of the Dominion, and by the two Houses of the Prince Edward Island Legislatures the latter specifying the electoral districts as set out in the Order in Council.

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*James Cockburn*  
*20th May 1873*

## APPENDICES.

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- 1 COLONIAL LAWS VALIDITY ACT, 1865.
2. LETTERS PATENT CONSTITUTING THE OFFICE OF  
GOVERNOR GENERAL OF CANADA.
3. INSTRUCTIONS TO ACCOMPANY SAME
4. QUEBEC RESOLUTIONS.



## APPENDIX I.

### COLONIAL LAWS VALIDITY ACT, 1865.

28-29 VIC., CAP. 63, (IMP.)

*An Act to remove Doubts as to the Validity of Colonial Laws.*

[29TH JUNE, 1865.]

WHEREAS doubts have been entertained respecting the validity of divers laws enacted, or purporting to be enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the powers of such Legislatures; and it is expedient that such doubts should be removed:

Be it hereby enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. The term "colony" shall in this Act include all of Her Majesty's Possessions abroad, in which there shall exist a legislature as hereinafter defined, except the *Channel Islands*, the *Isle of Man*, and such territories as may for the time being be vested in Her Majesty, under or by virtue of any Act of Parliament for the government of *India*;

The terms "Legislature" and "Colonial Legislature" shall severally signify the authority (other than the Imperial Parliament or Her Majesty in Council), competent to make laws for any colony;

The term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a legislative body of which one-half are elected by inhabitants of the colony;

The term "Colonial Law" shall include laws made for any colony, either by such Legislature as aforesaid or by Her Majesty in Council;



Act of Parliament, etc., when to extend to Colony;      An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament;

"Governor";      The term "Governor" shall mean the officer lawfully administering the Government of any colony;

"Letters Patent."      The term "Letters Patent" shall mean letters patent under the Great Seal of the United Kingdom of *Great Britain and Ireland*.

Colonial Law when void for repugnancy.      **2.** Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Colonial Law when not void for repugnancy.      **3.** No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of *England*, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid.

Colonial Law not void for inconsistency with instructions.      **4.** No colonial law, passed with the concurrence of or assented to by the Governor of any colony, or to be hereafter so passed or assented to, shall be, or be deemed to have been, void or inoperative by reason only of any instructions with reference to such law, or the subject thereof, which may have been given to such Governor, by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such Governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent, or last-mentioned instrument.

Colonial Legislatures may establish, &c., Courts of law.      **5.** Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been

Representative Legislature may alter Constitution.

passed in such manner and form as may from time to time be required, by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the colony.

6. The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the Governor; and any proclamation, purporting to be published by authority of the Governor, in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent.

Certified copies of laws to be evidence that they are properly passed.

Proclamation to be evidence of assent and disallowance.

And whereas doubts are entertained respecting the validity of certain Acts enacted, or reputed to be enacted, by the Legislature of South Australia: Be it further enacted as follows:

7. All laws or reputed laws enacted or purporting to have been enacted by the said Legislature, or by persons or bodies of persons for the time being acting as such Legislature, which have received the assent of Her Majesty in Council, or which have received the assent of the Governor of the said Colony in the name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the date of such assent for all purposes whatever; provided that nothing herein contained shall be deemed to give effect to any law or reputed law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful disallowance or repeal of any law.

Certain Acts of Legislature of South Australia to be valid.

## APPENDIX II.

### DRAFT OF LETTERS-PATENT 'PASSED UNDER THE GREAT SEAL OF THE UNITED KINGDOM,

*Constituting the Office of Governor-General of the Dominion of  
Canada.*

*Letters-Patent,*  
*Dated 5th October, 1878.* }

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain  
and Ireland, Queen, Defender of the Faith, Empress of India;

To all to whom these Presents shall come, Greeting:

WHEREAS We did, by certain Letters-Patent under the Great Seal of  
Our United Kingdom of Great Britain and Ireland, bearing date at  
Westminster the Twenty-second day of May, 1872, in the Thirty-fifth  
Year of Our Reign, constitute and appoint Our Right Trusty and Right  
Well-beloved Cousin and Councillor, Frederick Temple, Earl of Dufferin,  
Knight of Our Most Illustrious Order of Saint Patrick, Knight Com-  
mander of Our Most Honorable Order of the Bath (now Knight Grand  
Cross of Our Most Distinguished Order of Saint Michael and Saint  
George), to be Our Governor-General in and over Our Dominion of  
Canada for and during Our will and pleasure:

And whereas by the 12th section of "The British North America Act,  
1867," certain powers, authorities, and functions were declared to be  
vested in the Governor-General:

And whereas We are desirous of making effectual and permanent  
provision for the office of Governor-General in and over Our said  
Dominion of Canada, without making new Letters-Patent on each demise  
of the said Office:

Now know ye that We have revoked and determined, and by these  
presents do revoke and determine, the said recited Letters-Patent of  
the Twenty-second day of May, 1872, and every clause, article and thing  
therein contained:

And further know ye that We, of our special grace, certain know-  
ledge, and mere motion, have thought fit to constitute, order, and

declare, and do by these presents constitute, order, and declare that there shall be a Governor-General (hereinafter called Our said Governor-General) in and over Our Dominion of Canada (hereinafter called Our said Dominion), and that the person who shall fill the said Office of the Governor-General shall be from time to time appointed by Commission under our Sign-Manual and Signet. And we do hereby authorize and command Our said Governor-General to do and execute, in due manner, all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of "The British North America Act, 1867," and of these present Letters-Patent, and of such Commission as may be issued to him under Our Sign-Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign-Manual and Signet, or by Our Order in Our Privy Council, or by us through one of Our Principal Secretaries of State, and to such Laws as are or shall hereafter be in force in Our said Dominion.

II. And We do hereby authorize and empower Our said Governor-General to keep and use the Great Seal of Our said Dominion for sealing all things whatsoever that shall pass the said Great Seal.

III. And We do further authorize and empower Our said Governor-General to constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Dominion, as may be lawfully constituted or appointed by Us.

IV. And We do further authorize and empower Our said Governor-General, so far as we lawfully may, upon sufficient cause to him appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any office within Our said Dominion, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name or under Our authority.

V. And We do further authorize and empower Our said Governor-General to exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving the Parliament of Our said Dominion.

VI. And whereas by "The British North America Act, 1867," it is amongst other things enacted, that it shall be lawful for Us, if We think fit, to authorize the Governor-General of Our Dominion of Canada to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion, and in that capacity to exercise, during the pleasure of Our said Governor-General, such of the powers, authorities, and functions of Our said Governor-General as he may deem it necessary or expedient to assign to such Deputy or Deputies, subject to any limitations or directions from time to time expressed or given by Us: Now We do hereby authorize and em-



power Our said Governor-General, subject to such limitations and directions as aforesaid, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion of Canada, and in that capacity to exercise, during his pleasure, such of his powers, functions, and authorities as he may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise of any such power, authority or function by Our said Governor-General in person.

VII. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor-General out of Our said Dominion, all and every the powers and authorities herein granted to him shall, until our further pleasure is signified therein, be vested in such person as may be appointed by Us under our Sign-Manual and Signet to be Our Lieutenant-Governor of Our said Dominion; or if there shall be no such Lieutenant-Governor in Our said Dominion, then in such person or persons as may be appointed by Us under our Sign-Manual and Signet to administer the Government of the same; and in case there shall be no person or persons within Our said Dominion so appointed by Us, then in the Senior Officer for the time being in command of our regular troops in our said Dominion: Provided that no such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the oaths appointed to be taken by the Governor-General of Our said Dominion, and in the manner provided by the Instructions accompanying these Our Letters-Patent.

VIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of Our said Dominion, to be obedient, aiding and assisting unto our said Governor-General, or, in the event of his death, incapacity, or absence, to such person or persons as may, from time to time, under the provisions of these, Our Letters-Patent, administer the Government of Our said Dominion.

IX. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter or amend these Our Letters-Patent as to Us or them shall seem meet.

X. And We do further direct and enjoin that these Our Letters-Patent shall be read and proclaimed at such place or places as Our said Governor-General shall think fit within Our said Dominion of Canada.

In Witness whereof We have caused these our Letters to be made Patent. Witness Ourselves at Westminster, the Fifth day of October, in the Forty-second Year of Our Reign.

By Warrant under the Queen's Sign-Manual.

C. ROMILLY.

## APPENDIX III.

### DRAFT OF INSTRUCTIONS

*Passed under the Royal Sign-Manual and Signet to the Governor-General of the Dominion of Canada.*

*Dated 5th October, 1878.*

*VICTORIA R.*

Instructions to Our Governor-General in and over Our Dominion of Canada, or, in his absence, to Our Lieutenant-Governor or the Officer for the time being administering the Government of Our said Dominion.

Given at our Court at Balmoral, this Fifth day of October, 1878, in the Forty-second year of Our Reign.

WHEREAS by certain Letters-Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General (hereinafter called Our said Governor-General) in and over Our Dominion of Canada (hereinafter called Our said Dominion), and We have thereby authorized and commanded Our said Governor-General to do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters-Patent, and of such Commission as may be issued to him under Our Sign-Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign-Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and to such Laws as are or shall hereafter be in force in Our said Dominion :

Now, therefore, We do, by these, Our Instructions, under Our Sign-Manual and Signet, declare Our pleasure to be that Our said Governor-General for the time being shall, with all due solemnity, cause Our Commission, under Our Sign-Manual and Signet, appointing Our said Governor-General for the time being, to be read and published in the presence of the Chief Justice for the time being, or other Judge of the Supreme Court of Our said Dominion, and of the members of the Privy Council in Our said Dominion :

And We do further declare Our pleasure to be that Our said Governor-General, and every other Officer appointed to administer the Government of Our said Dominion, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled : " An Act to Amend the Law relating to Promissory Oaths ;" and likewise that he or they shall take the usual Oath for the due execution of the Office of Our Governor-General in and over Our said Dominion, and for the due and impartial administration of justice ; which Oaths the said Chief Justice for the time being, of Our said Dominion, or, in his absence, or in the event of his being otherwise incapacitated, any Judge of the Supreme Court of Our said Dominion shall, and he is hereby required to tender and administer unto him or them.

II. And We do authorize and require Our said Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every persons or person as he shall think fit, who shall hold any office or place of trust or profit in Our said Dominion, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time, be prescribed by any Laws or Statutes in that behalf made and provided.

III. And We do require Our said Governor-General to communicate forthwith to the Privy Council for Our said Dominion these Our Instructions, and likewise all such others from time to time as he shall find convenient for Our service to be imparted to them.

IV. Our said Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such Laws ; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Dominion, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

V. And We do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime has been committed for which the offender may be tried within Our said Dominion, to grant a pardon to any accomplice not being the actual perpetrator of such crime, who shall give such information as shall lead to the conviction of the principal offender ; and further, to grant to any offender convicted of any crime in any Court, or before any Judge, Justice, or Magistrate, within Our said Dominion, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures

which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Dominion. And We do hereby direct and enjoin that Our said Governor-General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council for Our said Dominion, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of Our said Dominion, Our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

VI. And whereas great prejudice may happen to Our service and to the security of Our said Dominion by the absence of Our said Governor-General, he shall not, upon any pretence whatever, quit Our said Dominion without having first obtained leave from Us for so doing under Our Sign-Manual and Signet, or through one of Our Principal Secretaries of State.

V.R.

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## APPENDIX IV.

### QUEBEC CONFERENCE RESOLUTIONS, 1864.

1. The best interests and present and future prosperity of British North America will be promoted by a federal union, under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces.

2. In the federation of the British North American Provinces, the system of Government best adapted under existing circumstances to protect the diversified interests in the several Provinces, and secure efficiency, harmony and permanency in the working of the union, would be a general Government, charged with matters of common interest to the whole country; and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, charged with the control of local matters in their respective sections; provision being made for the admission into the union, on equitable terms, of Newfoundland, the North-West Territory, British Columbia, and Vancouver.

3. In framing a constitution for the general Government, the Conference, with a view to the perpetuation of our connection with the mother country, and to the promotion of the best interests of the people of these Provinces, desire to follow the model of the British constitution so far as our circumstances will permit.

4. The Executive authority or government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British constitution, by the Sovereign personally, or by the representative of the Sovereign duly authorized.

5. The Sovereign or Representative of the Sovereign shall be Commander in Chief of the land and naval militia forces.

6. There shall be a General Legislature or Parliament for the federated Provinces, composed of a Legislative Council and a House of Commons.

7. For the purpose of forming the Legislative Council, the federated Provinces shall be considered as consisting of three divisions: 1st, Upper

Canada, 2nd, Lower Canada, 3rd, Nova Scotia, New Brunswick, and Prince Edward Island; each division with an equal representation in the Legislative Council.

8. Upper Canada shall be represented in the Legislative Council by 24 members, Lower Canada by 24 members, and the three maritime Provinces by 24 members, of which Nova Scotia shall have 10, New Brunswick 10, and Prince Edward Island 4 members.

9. The Colony of Newfoundland shall be entitled to enter the proposed union, with a representation in the Legislative Council of 4 members.

10. The North-West Territory, British Columbia and Vancouver shall be admitted into the union on such terms and conditions as the Parliament of the federated Provinces shall deem equitable, and as shall receive the assent of Her Majesty; and, in the case of the Province of British Columbia or Vancouver, as shall be agreed to by the Legislature of such Province.

11. The members of the Legislative Council shall be appointed by the Crown under the great seal of the general government, and shall hold office during life; if any Legislative Councillor shall, for two consecutive sessions of Parliament, fail to give his attendance in the said Council, his seat shall thereby become vacant.

12. The members of the Legislative Council shall be British subjects by birth or naturalization, of the full age of thirty years, shall possess a continuous real property qualification of four thousand dollars over and above all incumbrances, and shall be and continue worth that sum over and above their debts and liabilities, but in the case of Newfoundland and Prince Edward Island the property may be either real or personal.

13. If any question shall arise as to the qualification of a Legislative Councillor, the same shall be determined by the Council.

14. The first selection of the members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces, so far as a sufficient number be found qualified and willing to serve; such members shall be appointed by the Crown at the recommendation of the general executive Government, upon the nomination of the respective local Governments, and in such nomination due regard shall be had to the claims of the members of the Legislative Council of the opposition in each Province, so that all political parties may as nearly as possible be fairly represented.

15. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes.

16. Each of the twenty-four Legislative Councillors representing Lower Canada in the Legislative Council of the general Legislature, shall be appointed to represent one of the twenty-four electoral divisions mentioned in Schedule A of chapter first of the Consolidated Statutes of Canada, and such Councillor shall reside or possess his qualification in the division he is appointed to represent.

17. The basis of representation in the House of Commons shall be population, as determined by the official census every ten years; and the number of members at first shall be 194, distributed as follows:—

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18. Until the official census of 1871 has been made up, there shall be no change in the number of representatives from the several sections.

19. Immediately after the completion of the census of 1871, and immediately after every decennial census thereafter, the representation from each section in the House of Commons shall be readjusted on the basis of population.

20. For the purpose of such re-adjustments, Lower Canada shall always be assigned sixty-five members, and each of the other sections shall at each re-adjustment receive, for the ten years then next succeeding, the number of members to which it will be entitled on the same ratio of representation to population as Lower Canada will enjoy according to the census last taken by having sixty-five members.

21. No reduction shall be made in the number of members returned by any section, unless its population shall have decreased, relatively to the population of the whole Union, to the extent of five per centum.

22. In computing at each decennial period the number of members to which each section is entitled, no fractional parts shall be considered, unless when exceeding one-half the number entitling to a member, in which case a member shall be given for each such fractional part.

23. The Legislature of each Province shall divide such Province into the proper number of constituencies, and define the boundaries of each of them.

24. The local Legislature of each Province may, from time to time, alter the electoral districts for the purposes of representation in such local Legislature, and distribute the representatives to which the Province is entitled in such local Legislature, in any manner such Legislature may see fit.

25. The number of members may at any time be increased by the general Parliament,—regard being had to the proportionate rights then existing.

26. Until provisions are made by the General Parliament, all the laws which, at the date of the proclamation constituting the Union, are in force in the Provinces respectively, relating to the qualification and disqualification of any person to be elected, or to sit or vote as a member of the Assembly in the said Provinces respectively; and relating to the qualification or disqualification of voters and to the oaths to be taken by voters, and to returning officers and their powers and duties,—and relating to the proceedings at elections, and to the period during which such elections may be continued,—and relating to the trial of controverted elections, and the proceedings incident thereto,—and relating to the vacating of seats of members, and to the issuing and execution of new writs, in case of any seat being vacated otherwise than by a dissolution,—shall respectively apply to elections of members to serve in the House of Commons, for places situate in those Provinces respectively.

27. Every House of Commons shall continue for five years from the day of the return of the writs choosing the same, and no longer; subject, nevertheless, to be sooner prorogued or dissolved by the Governor.

28. There shall be a session of the general Parliament once, at least, in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the general Parliament in one session, and the first sitting thereof in the next session.

29. The general Parliament shall have power to make laws for the peace, welfare, and good government of the federated provinces (saving the sovereignty of England), and especially laws respecting the following subjects:—

- ♣ (1) The public debt and property.
- ♣ (2) The regulation of trade and commerce.
- (3) The imposition or regulation of duties of customs on imports and exports,—except on exports of timber, logs, masts, spars, deals and sawn lumber from New Brunswick, and of coal and other minerals from Nova Scotia.
- (4) The imposition or regulation of excise duties.
- ♣ (5) The raising of money by all or any other modes or systems of taxation.
- ♣ (6) The borrowing of money on the public credit.
- ♣ (7) Postal service.
- ♣ (8) Lines of steam or other ships, railways, canals and other works, connecting any two or more of the Provinces together or extending beyond the limits of any Province.



- ✓ (9) Lines of steamships between the federated provinces and other countries.
- (10) Telegraphic communication and the incorporation of telegraphic companies.
- 2 (11) All such works as shall, although lying wholly within any Province be specially declared by the Acts authorizing them to be for the general advantage.
- 2 (12) The census.
- ✓ (13) Militia—military and naval service and defence.
- ✓ (14) Beacons, buoys and light houses.
- ✓ (15) Navigation and shipping.
- ✓ (16) Quarantine.
- ✓ (17) Sea-coast and island fisheries.
- ✓ (18) Ferries between any province and a foreign country, or between any two provinces.
- ✓ (19) Currency and coinage.
- ✓ (20) Banking—incorporation of banks, and the issue of paper money.
- ✓ (21) Savings banks.
- ✓ (22) Weights and measures.
- ✓ (23) Bills of exchange and promissory notes.
- ✓ (24) Interest.
- ✓ (25) Legal tender.
- ✓ (26) Bankruptcy and insolvency.
- ✓ (27) Patents of invention and discovery.
- ✓ (28) Copyrights.
- ✓ (29) Indians and lands reserved for the Indians.
- ✓ (30) Naturalization and aliens.
- ✓ (31) Marriage and divorce.
- ✓ (32) The criminal law, excepting the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.
- ✓ (33) Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island, and rendering uniform the procedure of all or any of the courts in these Provinces; but any statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof.
- ✓ (34) The establishment of a general Court of Appeal for the federated Provinces.
- ✓ (35) Immigration.
- ✓ (36) Agriculture.

✓ (37) And generally respecting all matters of a general character, not specially and exclusively reserved for the local Governments and Legislatures.

✓ 30. The general Government and Parliament shall have all powers necessary or proper for performing the obligations of the federated Provinces, as part of the British Empire, to foreign countries arising under treaties between Great Britain and such countries.

✓ 31. The general Parliament may also, from time to time, establish additional courts, and the general Government may appoint judges and officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of Parliament.

✓ 32. All courts, judges and officers of the several Provinces shall aid, assist and obey the general Government in the exercise of its rights and powers, and for such purposes shall be held to be courts, judges and officers of the general Government.

✓ 33. The general Government shall appoint and pay the judges of the Superior Courts in each Province, and of the County Courts in Upper Canada, and Parliament shall fix their salaries.

34. Until the consolidation of the laws of Upper Canada, New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, the judges of these Provinces appointed by the general Government shall be selected from their respective bars.

35. The judges of the courts of Lower Canada shall be selected from the bar of Lower Canada.

36. The judges of the Court of Admiralty now receiving salaries shall be paid by the general Government.

37. The judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable only on the address of both Houses of Parliament.

#### LOCAL GOVERNMENT.

38. For each of the Provinces there shall be an executive officer, styled the Lieutenant-Governor, who shall be appointed by the Governor-General in Council, under the Great Seal of the federated Provinces, during pleasure; such pleasure not to be exercised before the expiration of the first five years, except for cause; such cause to be communicated in writing to the Lieutenant-Governor immediately after the exercise of the pleasure as aforesaid, and also by message to both Houses of Parliament, within the first week of the first session afterwards.

39. The Lieutenant-Governor of each Province shall be paid by the general Government.

40. In undertaking to pay the salaries of the Lieutenant-Governors, the Conference does not desire to prejudice the claim of Prince Edward Island upon the Imperial Government for the amount now paid for the salary of the Lieutenant-Governor thereof.

41. The local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of such Province shall provide.

42. The local Legislatures shall have power to alter or amend their constitution from time to time.

43. The local Legislatures shall have power to make laws respecting the following subjects :—

- ✓ (1) Direct taxation, and in New Brunswick the imposition of duties on the export of timber, logs, masts, spars, deals and sawn lumber; and in Nova Scotia, on coals and other minerals.
- ✓ (2) Borrowing money on the credit of the Province.
- ✓ (3) The establishment and tenure of local offices, and the appointment and payment of local officers.
- ✓ (4) Agriculture.
- ✓ (5) Immigration.
- ✓ (6) Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their denominational schools, at the time when the union goes into operation.
- ✓ (7) The sale and management of public lands excepting lands belonging to the general Government.
- (8) Sea-coast and inland fisheries.
- (9) The establishment, maintenance and management of penitentiaries, and of public and reformatory prisons.
- ✓ (10) The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions.
- ✓ (11) Municipal institutions.
- ✓ (12) Shop, saloon, tavern, auctioneer and other licenses.
- ✓ (13) Local works.
- ✓ (14) The incorporation of private or local companies, except such as relate to matters assigned to the general Parliament.
- ✓ (15) Property and civil rights, excepting those portions thereof assigned to the general Parliament.
- ✓ (16) Inflicting punishment by fine, penalties, imprisonment or otherwise, for the breach of laws passed in relation to any subject within their jurisdiction.

- 20 (17) The administration of justice, including the constitution, maintenance and organization of the courts,—both of civil and criminal jurisdiction, and including also the procedure in civil matters.
- 18 (18) And generally all matters of a private or local nature, not assigned to the general Parliament.

44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part which belongs of right to the Crown, shall be administered by the Lieutenant-Governor of each Province in Council, subject to any instructions he may, from time to time, receive from the general Government, and subject to any provisions that may be made in this behalf by the general Parliament.

## MISCELLANEOUS.

45. In regard to all subjects over which jurisdiction belongs to both the general and local Legislatures, the laws of the general Parliament shall control and supersede those made by the local Legislature, and the latter shall be void so far as they are repugnant to or inconsistent with, the former.

46. Both the English and French languages may be employed in the general Parliament and in its proceedings, and in the local Legislature of Lower Canada, and also in the Federal courts, and in the courts of Lower Canada.

47. No lands or property belonging to the general or local Governments shall be liable to taxation.

48. All bills for appropriating any part of the public revenue, or for imposing any new tax or impost, shall originate in the House of Commons or House of Assembly, as the case may be.

49. The House of Commons or House of Assembly shall not originate or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue, or of any tax or impost to any purpose, not first recommended by message of the Governor-General or the Lieutenant-Governor, as the case may be, during the session in which such vote, resolution, address or bill is passed.

50. Any bill of the general Parliament may be reserved in the usual manner for Her Majesty's assent, and any bill of the local Legislatures may, in like manner, be reserved for the consideration of the Governor-General.

51. Any bill passed by the general Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of bills passed by the Legislatures of the said Provinces hitherto; and, in like manner,



any bill passed by a local Legislature shall be subject to disallowance by the Governor-General within one year after the passing thereof.

52. The seat of Government of the federated Provinces shall be Ottawa, subject to the Royal prerogative.

53. Subject to any future action of the respective local Governments, the seat of the local Government in Upper Canada shall be Toronto; of Lower Canada, Quebec; and the seats of the local Governments in the other Provinces shall be as at present.

#### PROPERTY AND LIABILITIES.

54. All stocks, cash, bankers' balances and securities for money belonging to each Province at the time of the Union, except as hereinafter mentioned, shall belong to the general Government.

55. The following public works and property of each Province shall belong to the general Government, to wit:—

- (1) Canals.
- (2) Public harbours.
- (3) Light houses and piers.
- (4) Steamboats, dredges and public vessels.
- (5) River and lake improvements.
- (6) Railway and railway stocks, mortgages and other debts due by railway companies.
- (7) Military roads.
- (8) Custom houses, post offices and other public buildings, except such as may be set aside by the general Government for the use of the local Legislatures and Governments.
- (9) Property transferred by the Imperial Government and known as ordnance property.
- (10) Armories, drill sheds, military clothing and munitions of war; and
- (11) Lands set apart for public purposes.

56. All lands, mines, minerals and royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick and Prince Edward Island, for the use of such Provinces, shall belong to the local Government of the territory in which the same are so situate; subject to any trusts that may exist in respect to any of such lands or to any interest of other persons in respect of the same.

57. All sums due from purchasers or lessees of such lands, mines or minerals at the time of the Union, shall also belong to the local Governments.

58. All assets connected with such portions of the public debt of any Province as are assumed by the local Governments shall also belong to those Governments respectively.

59. The several Provinces shall retain all other public property therein, subject to the right of the general Government to assume any lands or public property required for fortifications or the defence of the country.

60. The general Government shall assume all the debts and liabilities of each Province.

61. The debt of Canada, not specially assumed by Upper and Lower Canada respectively, shall not exceed, at the time of the Union, \$62,500,000; Nova Scotia shall enter the Union with a debt not exceeding \$8,000,000; and New Brunswick with a debt not exceeding \$7,000,000.

62. In case Nova Scotia or New Brunswick do not incur liabilities beyond those for which their Governments are now bound, and which shall make their debts at the date of union less than \$8,000,000 and \$7,000,000 respectively, they shall be entitled to interest at five per cent. on the amount not so incurred, in like manner as is hereinafter provided for Newfoundland and Prince Edward Island; the foregoing resolution being in no respect intended to limit the powers given to the respective Governments of those Provinces, by Legislative authority, but only to limit the maximum amount of charge to be assumed by the general Government; provided always, that the powers so conferred by the respective Legislatures shall be exercised within five years from this date, or the same shall then lapse.

63. Newfoundland and Prince Edward Island, not having incurred debts equal to those of the other Provinces, shall be entitled to receive, by half-yearly payments, in advance, from the general Government, the interest at five per cent. on the difference between the actual amount of their respective debts at the time of the Union, and the average amount of indebtedness per head of the population of Canada, Nova Scotia and New Brunswick.

64. In consideration of the transfer to the general Parliament of the powers of taxation, an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population, as established by the census of 1861; the population of Newfoundland being estimated at 130,000. Such aid shall be in full settlement of all future demands upon the general Government for local purposes, and shall be paid half-yearly in advance to each Province.

65. The position of New Brunswick being such as to entail large immediate charges upon her local revenues, it is agreed that for the period of ten years, from the time when the Union takes effect, an additional

allowance of \$63,000 per annum shall be made to that Province. But that so long as the liability of that Province remains under \$7,000,000, a deduction equal to the interest of such deficiency shall be made from the \$63,000.

66. In consideration of the surrender to the general Government, by Newfoundland, of all its rights in mines and minerals, and of all the ungranted and unoccupied lands of the Crown, it is agreed that the sum of \$150,000 shall each year be paid to that Province, by semi-annual payments; provided that that Colony shall retain the right of opening, constructing and controlling roads and bridges through any of the said lands, subject to any laws which the general Parliament may pass in respect of the same.

67. All engagements that may, before the Union, be entered into with the Imperial Government for the defence of the country, shall be assumed by the general Government.

68. The general Government shall secure, without delay, the completion of the Intercolonial Railway from Riviere du Loup, through New Brunswick, to Truro in Nova Scotia.

69. The communications with the North-Western Territory, and the improvements required for the development of the trade of the great west with the seaboard, are regarded by this conference as subjects of the highest importance to the federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.

70. The sanction of the Imperial and local Parliaments shall be sought for the union of the Provinces, on the principles adopted by the Conference.

71. That Her Majesty the Queen be solicited to determine the rank and name of the federated Provinces.

72. The proceedings of the Conference shall be authenticated by the signatures of the delegates, and submitted by each delegation to its own Government; and the Chairman is authorized to submit a copy to the Governor-General for transmission to the Secretary of State for the Colonies.

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(NOTE.—On pp. 204 and 205, we have placed side by side, for convenience of reference and comparison, sections 91 and 92 of the B. N. A. Act, containing an enumeration of the various subjects committed to the parliament of Canada and the provincial legislatures, respectively. By reference to the head lines adopted throughout chapter XII. any given subsection of section 91 or 92 can be quickly found.)

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